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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]1911

No. [redacted]26

KALEM COMPANY, APPELLANT,

vs.

HARPER BROTHERS, MARC KLAW, ABRAHAM ERLANGER, AND HENRY L. WALLACE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 31, 1909.

(21,575.)

(21,575.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

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vs.

HARPER BROTHERS, MARC KLAW, ABRAHAM ERLANGER, AND HENRY L. WALLACE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 19, 1910.

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a United States Circuit Court of Appeals for the Second Circuit.

HARPER BROTHERS et al., Complainants-Appellees,
vs.
THE KALEM COMPANY, Impleaded, etc., Defendant-Appellant.

Transcript of Record.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Printed Under the Direction of the Clerk.

1 The President of the United States of America to Kalem Company and Kleine Optical Company, Greeting:

[L. S.]

You are hereby commanded that you and each of you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in Equity, on the first Monday of April, A. D. 1908, wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by Harper & Brothers, Marc Klaw and Abraham L. Erlanger, composing the firm of Klaw & Erlanger, and Henry L. Wallace, as Administrator of the goods, chattels and effects of Susan E. Wallace, deceased, and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of Two Hundred and Fifty Dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, on the 13th day of March, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America the one hundred and thirty-second.

JOHN A. SHIELDS, *Clerk.*

DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainants.

The defendants are required to enter appearance in the above cause, in the Clerk's office of this Court, on or before
2 the first Monday of April, 1908, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

I hereby certify, That on the 13th day of March, 1908, at the City of New York, in my District, I personally served the within Subpœna in Equity upon the within-named Defendant Kalem & Company, by exhibiting to Frank W. Marion, as Sec'y & Treas. of said Com-

pany, at No. 131 West 24th St., N. Y. City, the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, That on the 14th day of March, 1908, at the City of New York, in my district, I served the within Subpœna in Equity upon the within named Defendant Kleine Optical Company, by exhibiting to Charles B. Kleine, as Manager of said Company at No. 652 6th Ave., N. Y. City, N. Y., the within original, and at the same time leaving with him a copy thereof.

WM. HENKEL,
United States Marshal, Southern District of New York.

Dated March 14th, 1908.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y.—Filed Mar. 14, 1908.—John A. Shields, Clerk.

Circuit Court of the United States, Southern District of New York, Second Circuit.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York:

Harper & Brothers, a domestic corporation, organized and existing under the laws of the State of New York, and Citizen
3 of the State of New York, Marc Klaw, a citizen of the State of New York, and Abraham L. Erlanger, a citizen of the State of New York, composing the firm of Klaw & Erlanger, and Henry L. Wallace, as Administrator of the Goods, Chattels and effects, of Susan E. Wallace, Deceased, a citizen of the State of Indiana, bring this their Bill of Complaint against Kalem Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of the State of Illinois; and the Kleine Optical Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of the State of Illinois. Thereupon your orators complain and show:

That your orator, Harper & Brothers, is a domestic corporation, organized and existing under and by virtue of the laws of the State of New York, and is a citizen of the State of New York, carrying on business in the City and State of New York, and within the Southern District of New York, and has its office for the transaction of its business in the City of New York, Borough of Manhattan. That it now is, and for some time past has been, engaged in the business of publishing, acquiring, vending and selling books, magazines, publications and literary productions, in the City of New York and Southern District of New York, and in various other Cities and States in the United States and elsewhere.

That your orators, Marc Klaw and Abraham L. Erlanger, at all the times hereinafter mentioned were and still are co-partners, doing business under the firm name and style of Klaw & Erlanger, and each of them was and is a citizen of the State of New York, and a resident and inhabitant of the State of New York, having their

office for the transaction of their business in the City of New York, Borough of Manhattan, in the Southern District of New York. That your orators, Klaw & Erlanger, have for many years been, and still are engaged in the business of purchasing, acquiring,
4 licensing and producing dramatic compositions and plays upon the stage in the City of New York, and Southern District of New York, and in various other cities of the United States and elsewhere.

That you orator, Henry L. Wallace, is, and at all the times hereinafter mentioned, was a citizen of the State of Indiana. That he is the son of Lewis Wallace, the author of the book, entitled "Ben Hur," to which reference will hereafter be made, who at the time of his death was a citizen of the State of Indiana (where the said Lewis Wallace resided at the time of his death), and resident and inhabitant of Crawfordsville, County of Montgomery. That said Lewis Wallace died in the year 1905, at Crawfordsville, leaving a Last Will and Testament, which was duly admitted to probate in the Montgomery Circuit Court of the State of Indiana, wherein and whereby his wife, Susan E. Wallace, was named and appointed Executrix of the said Last Will and Testament, and made sole legatee and devisee thereunder. That Letters Testamentary were duly issued to Susan E. Wallace, who duly qualified as such Executrix, and entered upon the duties of her office and performed the same, and administered the trust imposed upon her by said Will.

That the said Susan E. Wallace, died intestate on the 1st day of October, 1907, in the State of Indiana, leaving as her only heir and next of kin your orator, Henry L. Wallace. That on or about the 28th day of October, 1907, the said Henry L. Wallace was duly appointed Administrator of the Goods, Chattels and Effects of the said Susan E. Wallace, deceased, by the Montgomery Circuit Court of Indiana, and is now acting as such administrator. That at the time of her death, the said Susan E. Wallace resided in the County of Montgomery, State of Indiana, and within the jurisdiction of the Montgomery Circuit Court of Indiana.

That the defendant, Kalem Company, is a foreign corpora-
5 tion organized and existing under the laws of the State of Illinois, and a citizen of the State of Illinois.

That the defendant, Kleine Optical Company, is a foreign corporation, organized and existing under the laws of the State of Illinois, and a citizen of the State of Illinois.

That heretofore, and prior to the commencement of this action, and the securing of the copyright and the exclusive rights, hereinafter more particularly referred to, Lewis Wallace, the father of your orator, Henry L. Wallace, hereinbefore referred to, invented, originated, composed and wrote, a certain book entitled "Ben Hur," a Tale of the Christ. That the said book and the title thereof were original with the said Lewis Wallace. The word "Ben" meaning "Son," and the two words in conjunction meaning "The Son of Hur."

That on or about the 7th day of May, 1880, the said Lewis Wallace, being then the author and the sole and exclusive proprietor and

owner of the said book, which was then in manuscript form and unpublished, and had never been adapted to be performed upon the stage, or in any manner or form dedicated to the public, did sell, assign, transfer and set over unto the firm of Harper & Brothers the said book "Ben Hur," and all his right in and to the same, and the title thereof, and of all other nature and kind, including the right to copyright the same, and the sole liberty of printing, reprinting, publishing, completing, copying, finishing and vending the same, and of dramatizing, adapting or arranging the said book, or any part thereof, for public performance or representation, or causing it to be dramatized, adapted or arranged, performed or represented by others; that at the same time the said Lewis Wallace delivered to the said firm of Harper & Brothers the manuscript of said book. That at said time the firm of Harper & Brothers was composed of John W. Harper, J. Henry Harper, Philip J. A. Harper, Fletcher Harper, Joseph W. Harper, Jr., and J. Abner Harper, all
6 citizens of the State of New York, and of the United States.

That the said firm of Harper & Brothers being then citizens of the United States, and the owners and sole and exclusive proprietors of the said book, did, before the day of publication in this or any foreign country, deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the said book, and did also, not later than the day of publication thereof, in this or any foreign country, deliver at the office of the Librarian of Congress, at Washington, District of Columbia, two copies of such copyrighted book, printed from type set within the limits of the United States, and from plates made therefrom, and the said Harper & Brothers in all respects complied with the provisions of the existing acts of Congress relating to copyrights. That the said Harper & Brothers gave notice of the said copyright by inserting in the several copies of every edition published, on the title page, or the page following, the following in words or substance: "Entered according to Act of Congress in the year 1880 by Harper & Brothers in the office of the Librarian of Congress at Washington." "All rights reserved." That annexed hereto and marked Exhibit "A" is a certificate of the Librarian of Congress of the said filing and deposit of the title of the said book in his office; and annexed hereto and marked Exhibit "B" is a certificate of the Librarian of Congress of the deposit in his office of two printed copies of said book; that a copy of said copyrighted book is deposited with the Clerk of this Court upon the filing of this bill, and your orators beg leave to produce the same upon the hearing or trial of this action or any motion made in the course of this suit.

For a valuable consideration the said book and the copyright thereof, and all other right, title and interest of every nature and kind in and to the said book and the title thereof, and in and to the
7 copyright of the said book, and of all and every right which the said firm of Harper & Brothers had or possessed in, to, or over the said book, or title thereof, and the copyright of the said book and title, and the right to dramatize the same for

production on the stage, were sold, assigned, transferred and set over to your orator, Harper & Brothers, prior to January 1st, 1906.

That the said book was capable of being dramatized and of dramatic representation, and that the characters depicted in the said book by the words, expression and action as told in the said book unveiled a story and made its representation on the stage practical and effective.

And your orators further show that in 1899, Klaw & Erlanger, your orators caused the said book to be dramatized and arranged for stage production, with the consent and approval of the — Harper & Brothers and said Lewis Wallace, by one William Young, who was employed for that purpose, and the manuscript of the dramatization of the said Young, was delivered, assigned and transferred to the said Harper & Brothers, and your orators, Harper & Brothers, being the proprietors and owners of the said dramatic composition, did duly copyright the same by depositing in the mail, within the United States, addressed to the Librarian of Congress at Washington, District of Columbia, before the day of publication in this or any foreign country, a printed copy of the title, of the said dramatic composition, to wit: "Ben Hur," and did also, not later than the day of publication thereof, in this or any foreign country, deliver at the Office of the Librarian of Congress at Washington, District of Columbia, two printed copies of such dramatic composition, which said two copies were printed from type set within the limits of the United States, and from plates made therefrom; and the said Harper & Brothers in all respects complied with the provisions of the existing Acts of Congress relating to copyright. That the said Harper &
8 Brothers gave notice of said copyright by inserting in the several copies of every edition of the said dramatic composition published, on the title page or the page immediately following, the following in words or substance: "Copyright 1880, 1899, by Harper & Brothers." That annexed hereto and marked Exhibit "C" is a certificate of the Librarian of Congress of the filing and deposit in his office of the said title of the said dramatic composition; and annexed hereto and marked Exhibit "D" is a certificate of the Librarian of Congress of the deposit of the said two copies of said dramatic composition.

And your orators further show that in the year 1899, by agreement entered *not* between your orators, Klaw & Erlanger, Harper & Brothers and Lewis Wallace, the said Klaw & Erlanger (two of your orators) acquired and were granted on the payment of certain royalties, the sole and exclusive right and privilege of producing upon the stage, and of authorizing others to produce upon the stage, and to perform and cause to be performed the said dramatic composition under the said title "Ben Hur." That it was made one of the conditions of the said right, license and privilege, that the said Klaw & Erlanger should only produce the said play under the said title "Ben Hur" by first-class companies, and that the said play should be equipped and produced in a manner adequate to every requirement for the proper preservation of the atmosphere and scenic character of the story and with a carefully selected cast of

players to interpret the characters of such dramatic version. That accordingly, your orators, Klaw & Erlanger, did organize a first class company of players to produce the said play, and gave one of the most stupendous and extensive stage productions ever attempted. That they expended, in producing said play, upwards of One hundred thousand ($100,000) Dollars, and the said play immediately become a great artistic and financial success. That it has been played continuously in the City of New York, Borough
9 of Manhattan, from November, 1899, to June, 1900; subsequently it was presented at the New York Theatre and the Academy of Music in the City of New York, Borough of Manhattan, having been performed for about three months at the New York Theatre, and it has been played during every theatrical season since 1899, and is now being performed by your orators, Klaw & Erlanger. That there has been expended, in advertising the said play, by Klaw & Erlanger, upwards of Three hundred thousand ($300,000) Dollars, and there has been paid to your orators, Harper & Brothers, and the said Lewis Wallace and his Executrix and your orator, Henry L. Wallace, upwards of the sum of Two hundred thousand ($200,000) Dollars in royalties. That the said play is being produced nightly by your orators, Klaw & Erlanger, under their said contract with your orators, Harper & Brothers, with great success and profit, and your orators, Harper & Brothers and Henry L. Wallace, are receiving weekly large royalties from the production of the said play given by said Klaw & Erlanger.

Your orators further show that the defendants, Kalem Company and Kleine Optical Company, both carry on business and have offices for the transaction of business in the Borough of Manhattan, City of New York, within the Southern District of New York, and produce and cause to be produced upon the stage, under the title of "Ben Hur," a substantial reproduction of the scenes, incidents and characters of the book "Ben Hur," and of the dramatization of the said book, advertising and announcing that the said representation and stage production is adapted from Gen. Lewis Wallace's famous book "Ben Hur," and of the play "Ben Hur," with the scenes, characters and incidents.

That the said defendant, Kalem Company, has caused pictures to be taken of the various scenes and characters and incidents of the said book of Gen. Lew Wallace entitled "Ben Hur," which in
10 connection with certain machines used by the defendant, Kleine Optical Company, permit a representation on the stage of the said characters, scenes and incidents of the said book and dramatization of "Ben Hur," which pictures are what is commonly called "moving pictures," representing the different characters in action, so as to tell the story of "Ben Hur," as produced by your orators upon the stage. The representation is given upon the stage and the moving pictures show all the characters and scenes in action, as produced by your orators, and tell the story as told in the book of Gen. Lew Wallace, and in the dramatization thereof herein referred to. That the said defendants, for a small sum, give performances and stage representations of the scenes, characters

and incidents of the said book and dramatic composition "Ben Hur," advertising and announcing the fact, and have caused and licensed others to give productions of the said scenes, characters and incidents under the said title, deriving a large revenue therefrom. That most of these productions given by the said defendants and their licensees are productions of a cheap order, in theaters and places of exhibition, charging not more than five or ten cents admission, and the said defendants and their licensees have given, and threaten to continue to give, productions within the Southern District of New York, and in various other cities and places, and widely advertise their intention to continue to give representations of the said play, and widely advertise their intention to license others to give similar productions. That the productions, as given by the defendants and their licensees, are not only given under the said title of "Ben Hur," but are published, advertised and announced and declared to be the play "Ben Hur" dramatized and adapted from the book of the said Gen. Lewis Wallace, and the production and representation as given tell the same story told in the book of the said Gen. Lewis Wallace and the said dramatization of the said book hereinbefore referred to. That the defendants, in canvassing and offering to produce and license others to produce the said stage production of "Ben Hur," represent it to be the stage production of the complainants, by means of advertisements, post cards and public announcements, adopting such and other divers means to mislead the public in believing that the productions given are of the said copyrighted play "Ben Hur." That the exclusive rights to the production are in the complainants by reason of the facts hereinabove set forth.

11

That annexed hereto, marked Exhibit "E," is the card of the defendant, Kalem Company, announcing and advertising said production of "Ben Hur," with one of the scenes taken from the said book of Lewis Wallace (also known as Gen. Lew Wallace); and annexed hereto, marked Exhibit "F," is a card of the Kleine Optical Company, advertising the production of the said play.

Exhibit "E" was received at the office of the defendant, Kleine Optical Company, as your orators allege on information and belief, and the scenes described on the card Exhibit "F," are of the various scenes taken from and found in the said novel of Gen. Lew Wallace, and the said production thereof, and the said scenes, as produced, tell the story as contained in the book and play.

Your orators further show that the said representations by defendants are given without the license, consent, authority or permission of your orators or any of them.

Your orators further show that they have been deriving large profits from the publication, representation and performance of the said dramatization of the said book, and that your orators Harper & Brothers and Henry L. Wallace, have been realizing and earning large royalties by reason of representation and performance of the said dramatization given by your orators, Klaw & Erlanger, and

your orators expect to realize in the future large earnings and
12 profits by reason of the said performances and representations.

And your orators further show that if the said defendants are permitted and allowed to give said dramatic representations of said play "Ben Hur," as aforesaid, without the license, consent, authority or permission of your orators, or to license, or cause others to produce the same, and to advertise their intention to continue to produce and license others to produce the said play, it will seriously injure your orators in their profits and royalties, and will lessen and diminish the value of the said book, "Ben Hur" and of the said dramatization thereof; and that the said injury cannot be accurately ascertained and computed and that compensation therefore cannot be made by damages. That the dangerous example and course of the defendants, if permitted, notwithstanding the proper rights of your orators will entail upon your orators, not only a great pecuniary loss and irreparable damage, but tend to destroy the value of their property in and to the said book and play. That the value to your orators in the said dramatization and book consists in the fact that they have the exclusive right to produce and license others to produce the play, and that they can be protected in the courts in such exclusive right, and that the Courts will enforce its orders, granted and entered, for the purpose of securing said production, and that if the defendants, or any other person, should represent the said play, or a literal simulation or colorable adaptation thereof, or otherwise use the title or a simulation thereof, your orators would be greatly and irreparably injured in their business and rights, and suffer great loss and damage pecuniary.

That the only assurance and protection of your orators from such irreparable loss and injury with regard to the premises, is and will be the intervention of this Honorable Court, by way of, and the nature of an injunction, to restrain the said defendants, from
13 doing, as in justice and equity your orators declare and believe the said defendants should be so restrained.

All of which things, doings and productions are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators.

In consideration thereof, and in as much as your orators can only have relief in the premises in this Honorable Court, where matters of this nature are properly cognizable and relievable, and to the end that the said defendants, may, if they can, show why your orators should not have the relief prayed for herby, and may true, full and perfect answers make to all and singular the matters hereinbefore stated and charged (but not under oath), as fully and particularly as if the same were here repeated, and that the defendants be decreed to render a full and true account to your orators of all moneys and profits derived from, or by reason of any performance by them of "Ben Hur," either by them or any of their licensees, and that the said defendants, their agents, servants, licensees and employees, and any other person acting under their direction, control or permission, may be enjoined and restrained until

a further hearing, pending the action, and thereafter perpetually, from playing, producing, exhibiting upon the stage, printing, publishing, translating, copying, adapting, advertising, or causing or licensing to be produced, represented, played, exhibited, printed, published, translated, copied, adapted or advertised, or otherwise exercising, or assuming to exercise or cause to be exercised or assumed, any control, ownership or dominion of, in, to or over the book entitled, "Ben Hur, a Tale of the Christ," the said dramatic composition entitled "Ben Hur," or any of its scenes, incidents, plots, or story, or any simulation or colorable imitation, or adaptation from the said book or dramatic composition under the title of "Ben Hur" or otherwise.

14 And in order that your orators may have such other relief as may be just, may it please your honors to grant unto your orators a writ of subpœna of the United States of America, issuing out — and under the seal of this Honorable Court, directed to the said defendants, Kalem Company and Kleine Optical Company, demanding them and each of them on a day therein to be named, and under a certain penalty, to be and appear in this Honorable Court, then and there to answer all and singular the premises and to stand to and perform and abide such further order, direction or decree as may be made against them, and may it please your honors to grant unto your orators a writ of injunction out of and under the seal of this Honorable Court, issued by one of your Honors, according to the form of the Statute in such case made and provided, and directing and restraining the said defendants, their agents, servants, licensees and employees, and all other persons acting under their direction, control or license, as hereinbefore prayed for, and for such other and further relief as to the Court may seem proper.

JOHN LARKIN,
Solicitors for Complainants, Harper & Brothers and Henry L. Wallace.
DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainants, Klaw & Erlanger.

Office and P. O. Address, No. 96 Broadway, Borough of Manhattan, New York City.

JOHN LARKIN,
Of Counsel.
ABRAM J. DITTENHOEFER,
DAVID GERBER,
Of Counsel for Klaw & Erlanger.

15 EXHIBIT A.

1880, No. 15581 L. "A 2

LIBRARY OF CONGRESS, *to wit:*

Be it remembered, That on the twelfth day of October, 1880, Harper & Brothers of New York, have deposited in this Office the

title of a Book, the title or description of which is in the following words, to wit:

Ben-Hur. A Tale of the Christ. By Lew Wallace. New York. Harper & Brothers, 1880,

the right whereof they claim as proprietors in conformity with the laws of the United States respecting Copyrights.

A. R. SPOFFORD,
Librarian of Congress.

I hereby certify that the foregoing is a true copy of the original record of copyright. In witness whereof, the seal of the Librarian of Congress has been hereto affixed this thirtieth day of December, 1907.

Office of the Register of Copyrights, Washington, D. C.

HERBERT PUTNAM,
Librarian of Congress.

Form A.

July 8, 1870—June 30, 1897.

[SEAL.] By THORVALD SOLBERG,
Register of Copyrights.

Written, J. H. L. O.
Revised, J. W. C.
Mailed, C. G.

(20, iv, 1903-2,000.)

16 EXHIBIT B.

Library of Congress,

Copyright Office,

Washington, D. C.

I hereby certify that two printed copies of the Book entitled:

Ben-Hur. A Tale of the Christ. By Lew Wallace. New York. Harper & Brothers, 1880,

were deposited in this office by Harper & Brothers, of New York, on the twenty-second day of October, 1880, and were credited on entry No. 15581 L of Class —, 1880, to complete copyright.

In witness whereof the seal of the Librarian of Congress has been hereto affixed, this thirtieth day of December, 1907.

HERBERT PUTNAM,
Librarian of Congress.

[SEAL.] By THORVALD SOLBERG,
Register of Copyrights.

Written, J. H. L. O.
Revised, J. W. C.
Mailed, G.

(2, xi, 1907-1,000.)

EXHIBIT C.

Class —, 1899, No. 71535. D 2

LIBRARY OF CONGRESS, *to wit:*

Be it remembered, That on the second day of November, 1899,
Harper & Brothers, of New York, N. Y., have deposited in
17 this Office the title of a dramatic composition the title or description of which is in the following words, to wit:

Lew Wallace's Ben-Hur. A play. Arranged for the State by William Young. 1899.

the right whereof they claim as proprietors in conformity with the laws of the United States respecting Copyrights.

Office of the Register of Copyrights, Washington, D. C.

HERBERT PUTNAM,
Librarian of Congress,
By THORVALD SOLBERG,
Register of Copyrights.

I hereby certify that the foregoing is a true copy of the original record of copyright. In witness whereof, the seal of the Librarian of Congress has been hereto affixed this thirtieth day of December, 1907.

Office of the Register of Copyrights, Washington, D. C.

HERBERT PUTNAM,
Librarian of Congress,
[SEAL.] By THORVALD SOLBERG,
Register of Copyrights.

Date.
Written, J. H. L. O.
Revised, J. W. C.
Mailed, e
Form D.
From April 5, 1909.
9-160

18 EXHIBIT D.

Library of Congress,

Copyright Office,

Washington, D. C.

I hereby certify that two printed copies of the dramatic composition entitled:

Lew Wallace's Ben-Hur. A Play. Arranged for the State by William Young. 1899.

were deposited in this office by Harper & Brothers of New York, N. Y., on the twenty-second day of November, 1899, and were

credited on entry No. 71535 of Class —, 1899, to complpete copyright.

In witness whereof the seal of the Librarian of Congress has been hereto affixed, this thirtieth day of December, 1907.

HERBERT PUTNAM,
Librarian of Congress,

[SEAL.] By THORVALD SOLBERG,
Register of Copyrights.

Written, J. H. L. O.
Revised, J. W. C.
Mailed, c

(2,xi,1907—1,000.)

(Here follow fac-similes marked pages 19 and 20.)

Exhibit E.

55

BEN HUR

Length, 1,000 feet (Aprox.)

Scenery and Supers by Pain's Fireworks Co., Manhattan Beach, N. Y. Direction Mr. Harry Temple. Costumes from Metropolitan Opera House. Chariot Race by 3d Battery, Brooklyn. Chief Charlotier, Hermon Rottjer. Drivers—Beal, Sheridan, Matler.

Book by Gène Gauntier.

56

Produced under the direction of
Mr. Frank Oakes Rose and Mr. Sidney Olcott.

Positively the Most Superb Moving Picture Spectacle Ever Produced in America

In Sixteen Magnificent Scenes With Illustrated Titles

Jerusalem Rebels at Roman Mis-rule.
The Family of Hur.
An Unfortunate Accident. Wounding of the Procurator.
Ben Hur in Chains to the Galleys.
Ben Hur Adopted by Arrias and Proclaimed a Roman Citizen.
Ben Hur and Messala—The Challenge. The Chariot Race.
1. Grand Triumphal Entry of Chariots and Athletes. 2. The Start. 3. First Time by. 4. Second Time by. 5. The Dash for the Finish. 6. The Finish.
Ben Hur Victor.

57

"The Most Pretentious and the Best Executed American Film Ever Presented."—*Herbert Miles.*

KALEM COMPANY, Inc., 131 West 24th St., New York City

58 **Exhibit F.**

A ROMAN SPECTACLE

PICTURES ADAPTED FROM GEN. LEW WALLACE'S FAMOUS BOOK

BEN HUR

59

WATCH FOR IT!

GET IT FIRST!

60

21 STATE OF NEW YORK,
City of New York, County of New York, ss:

J. Henry Harper, being duly sworn, deposes and says:

That he is the Vice President of Harper & Brothers, one of the complainants named in the above-entitled action; that he has read the foregoing Bill of Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the reason why this verification is made by deponent, and not by the Complainant, Harper & Brothers, is that the said complainant is a domestic corporation, of which the deponent is an officer, to wit: its Vice President.

J. HENRY HARPER.

Sworn to before me this 10th day of March, 1908.

PHILIP J. FOX,
[L. S.] *Notary Public, New York County, N. Y.*

STATE OF NEW YORK,
City of New York, County of New York, ss:

A. L. Erlanger, being duly sworn, deposes and says: That he is a member of the firm of Klaw & Erlanger, and one of the complainants named in the above-entitled action; that he has read the foregoing Bill of Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters
22 therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

A. L. ERLANGER.

Sworn to before me this 12th day of March, 1908.

EMILY L. FERNANDEZ,
[L. S.] *Notary Public, N. Y. Co., No.* 23.

(Endorsed:) U. S. Circuit Court, Southern District of N. Y.—Harper & Brothers, et al., Complainants, against Kalem Company, et al., Defendants.—Bill of Complaint.—Dittenhoefer, Gerber & James, Solicitors for Complainants, 96 Broadway, New York.—John Larkin, Solicitor for Complainants Harper Bros. & Wallace, 44 Wall St., New York City.—U. S. Circuit Court, Southern District, N. Y.—Filed Mar. 13, 1908—John A. Shields, Clerk.

23 United States Circuit Court, Southern District of New York.

In Equity. No. —.

HARPER & BROTHERS, MARC KLAW, and ABRAHAM L. ERLANGER, Composing the Firm of Klaw & Erlanger, and Henry L. Wallace, as Administrator of the Goods, Chattels, and Effects of Susan E. Wallace, Deceased, Complainants.

vs.

KALEM COMPANY and KLEINE OPTICAL COMPANY, Defendants.

The Plea of Kalem Company, One of the Defendants, to the Bill of Complaint in the Suit Above Entitled.

This defendant, by protestation, not confessing or acknowledging the matters and things in and by said bill of complaint set forth and alleged to be true in such manner and form as the same are therein and thereby set forth and alleged; but on the contrary, protesting that all the matters and things alleged and set forth in the said bill of complaint are immaterial and unnecessary to be answered unto, except as herein answered by plea, for plea to the whole bill of complaint says, that in and by the bill of complaint, suit is brought against the defendants Kalem Company and Kleine Optical Company for alleged infringement upon the copyright to a book
24 entitled "Ben Hur," and upon the copyright to a dramatic composition thereof also entitled "Ben Hur," and wherein it is alleged and charged as follows:

At folios 23 to 29 of the said bill of complaint:

"Your orators further show that the defendants Kalem Company and Kleine Optical Company * * * produce and cause to be produced upon the stage, under the title of 'Ben Hur,' a substantial reproduction of the scenes, incidents and characters of the book 'Ben Hur' and of the dramatization of the said book, advertising and announcing that the said representation and stage production is adapted from Gen. Lewis Wallace's famous book, 'Ben Hur' and of the play 'Ben Hur' with the scenes, characters and incidents. That the said defendant, Kalem Company, has caused pictures to be taken of the various scenes, characters and incidents of the said book of Gen. Lewis Wallace entitled 'Ben Hur,' which, in connection with certain machines used by the defendants, Kleine Optical Company, permit a representation on the stage of the said characters, scenes and incidents of the said book and dramatization of 'Ben Hur,' which pictures are what is commonly called 'moving pictures,' representing the different characters in action, so as to tell the story of 'Ben Hur' as produced by your orators upon the stage. The representation is given upon the stage and the moving pictures show all the characters and scenes in action, as produced by your orators, and tell the story as told in the book of Gen. Lew Wallace, and in the dramatization thereof herein referred to. That the said defendants, for a small sum, give performances and stage representations of the

scenes, characters and incidents of the said book and dramatic
25 composition 'Ben Hur,' advertising and announcing that fact, and have caused and licensed others to give productions of the said scenes, characters and incidents under the said title deriving a large revenue therefrom. That most of these productions given by the said defendants and their licensees are productions of a cheap order, in theatres and places of exhibition, charging not more than five and ten cents admission, and the said defendants and their licensees have given, and threaten to continue to give productions within the Southern District of New York, and in various other cities and places, and widely advertise their intention to continue to give representations of the said play, and widely advertise their intention to license others to give similar productions. That the production as given by the defendant and their licensees are not only given under the said title of 'Ben Hur,' but are published, advertised and announced and declared to be the play 'Ben Hur' dramatized and adapted from the book of the said Gen. Lewis Wallace, and the production and representation as given tells the same story told in the book of the said Gen. Lewis Wallace and the said dramatization of the said book hereinbefore referred to. That the defendants, in canvassing and offering to produce and license others to produce the said stage production of 'Ben Hur,' represent it to be the stage production of the complainants, by means of advertisements, post-cards and public announcements, adopting such, and other divers means to mislead the public in believing that the productions given are of the said copyrighted play 'Ben Hur.'"

But this defendant denies that it is producing or has ever produced either in conjunction with Kleine Optical Company
26 or otherwise, or within the Southern District of New York or elsewhere any reproduction of the scenes, incidents and characters of the book "Ben Hur" or the dramatization of the said book, or that this defendant, either alone or in conjunction with any one else, has given any performance or stage representation of the scenes, characters and incidents of the said book or dramatic composition, or that it has caused or licensed others to give such performances or representations, or any production of that sort or character, or that it has, either alone or in conjunction with another or others, advertised an intention to give such representation or to license others to give such production; or that it has represented anything to be the stage production of the complainants or any of them whether by advertisements, post-cards, public announcements or the like.

And this defendant avers that it is a corporation organized and existing under the laws of the State of New York, and that the principal part of its business is the production and sale of pictures such as are used in moving picture apparatus. That such pictures are made to represent persons and objects in motion and are prepared by first taking a series of pictures of such objects or persons when actually moving upon a celluloid film known as a "negative" film. That thereafter this defendant prepares from such negative film one or more positives, also upon celluloid films, which said positives de-

fendant sells in the open market, and which may be exhibited in or by any one of a variety of apparatus. Some of the users of such positive films exhibit the same by throwing them upon a screen by what is termed a projecting machine. Other customers mount the same in various kinds of "peep hole apparatus," within closed receptacles having a sight opening, where they may be viewed by a single observer. Such films are commonly termed "moving picture films" and depend for their value upon their use in and as a part of the apparatus in which they are exhibited.

27 And this defendant further avers that it does not itself exhibit such positive films or such negative films for any purpose whatsoever, but that it sells the same as articles of commerce and that among its customers is the defendant Kleine Optical Company which, as this defendant is informed and believes, is a jobber only buying and selling films among other articles of commerce, but never exhibiting the films.

And this defendant further avers that it caused a series of photographs to be taken by one of its photographing cameras, of some scenes or representations of incidents described in the book "Ben Hur" that is referred to in the Bill of Complaint, upon a celluloid film so as to form a series of negative photographs thereupon, and that thereafter this defendant prepared positive films from such negatives, and that it sold and disposed of the same in the ordinary course of business, the vendees thereof acquiring ownership of such films as articles of commerce, and no other rights. But this defendant, while admitting the sending of postal card advertisements of such as are annexed to the Bill of Complaint and marked "Exhibit E" and "Exhibit F," deny that by so doing it violated any rights of the complainants or of any of them, or that it thereby gave or caused to be given any dramatic or other representation of the book "Ben Hur," or that it licensed others so to do. And this defendant avers that, by reason of the care and skill with which its photographs aforesaid are produced, and by reason of the faithfulness of their reproduction of the scenes and incidents which they purport to represent, the use and exhibition of such pictures tend to arouse interest in the said book "Ben Hur," and to constitute a desirable advertisement of the said book, and of the drama based thereupon, both of which — referred to in the Bill of Complaint.

And this defendant further avers that a celluloid film containing a series of pictures and known as a moving picture film is
28 not a performance or representation of a dramatic composition or a copy of a book within the purpose and intent of the Statute.

And this defendant avers that by reason of the premises the complainants have no right to prosecute this suit against it, the said Kalem Company, and this Court has no right and ought not to take cognizance of or to entertain this suit, especially as against this defendant. All of which matters and things the said defendant avers to be true, and it pleads the same to the Court and prays the judgment of this Court whether it ought to be required to make any other or further answer to the Bill of Complaint, and prays to be

hence dismissed, with costs and charges in this behalf most wrongfully sustained.

KALEM COMPANY,
By KERR, PAGE & COOPER, *Solicitors.*

STATE OF NEW YORK,
County of New York, ss:

Frank J. Marion, being duly sworn, deposes and says that he is Secretary and Treasurer of the Kalem Company, a corporation organized and existing under the laws of the State of New York, on whose behalf the foregoing plea is being made, and that the foregoing plea is not interposed for the purpose of delay, and that the same is true in point of fact.

FRANK J. MARION.

Subscribed and sworn to before me this 25th day of March, 1908.
[SEAL.]
M. LAWSON DYER,
Notary Public (66), *N. Y. Co., N. Y.*

The undersigned counsel for the defendant, Kalem Company, one of the defendants in the above-entitled cause, hereby
29 certifies that in his opinion the foregoing plea is well founded in point of law.

DRURY W. COOPER,
Counsel for Kalem Company.

(Endorsed.) U. S. Circuit Court, Southern District of New York. In Equity, No. 2-160. Harper Bros. et al. vs. Kalem Co. and Kleine Optical Co. Plea of Kalem Company. Kerr, Page & Cooper, Sol'rs for Kalem Co., 149 Broadway, New York City. U. S. Circuit Court, Southern District, N. Y. Filed Mar. 27, 1908. John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

HARPER & BROTHERS, MARC KLAW and ABRAHAM L. ERLANGER, Composing the Firm of Klaw & Erlanger, and Henry L. Wallace, as Administrator of the Goods, Chattels and Effects of Susan E. Wallace, Deceased, Complainants,
against
KALEM COMPANY and KLEINE OPTICAL COMPANY, Defendants.

The Replication of the Above-named Complainants to the Plea of the Above-named Defendant, Kalem Company.

These replicants, saving and reserving to themselves all and all manner of advantage of exceptions which may be had and
30 taken to the manifold errors, uncertainties, and insufficiencies of the plea of said defendant, for replication thereunto say that they do and will ever maintain and prove their said bill to

be true, certain and sufficient in the law to be pleaded unto by said defendant, and that the plea of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by these replicants; without that, that any other matter or thing in the said plea contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied to, confessed or avoided, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain and prove as this Honorable Court will direct, and humbly as in and by their said bill they have already prayed.

JOHN LARKIN,
Solicitor for Complainants Harper & Brothers and Henry L. Wallace, as Administrator, etc.
DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainants Klaw and Erlanger.

(Endorsed:) United States Circuit Court, Southern District of New York. Harper & Brothers, et al., Complainants, against Kalem Company and Kleine Optical Company, Defendants. Replication. Dittenhoefer, Gerber & James, 96 Broadway, New York City. John Larkin, 44 Wall Street, New York City, Solicitors for Complainants. U. S. Circuit Court, Southern District N. Y. Filed Apr. 29, 1908. John A. Shields, Clerk.

31 United States Circuit Court, Southern District of New York.
In Equity.

No. 2-160.

HARPER & BROTHERS, MARC KLAW and ABRAHAM ERLANGER, Composing the Firm of Klaw & Erlanger, and Henry L. Wallace, as Administrator of the Goods, Chattels and Effects of Susan E. Wallace, Deceased, Complainants,

vs.

KALEM COMPANY, Defendant.

Stipulation of Facts.

It is hereby stipulated between counsel for the respective parties that the record for final hearing upon the plea interposed on behalf of the Kalem Company shall consist of the bill of complaint and its exhibits, the plea and the replication to the plea, and the following agreed statement of facts:

1. The Kalem Company is a corporation organized under the laws of the State of New York, and its principal business is the production of photographic films of the kind known as "moving picture films," that is, strips of celluloid or the like containing a series of photographs depicting objects or persons in motion, the films being designed to be moved so rapidly across the field of vision or across the lens of a projecting machine as to produce the effect known as the

"persistence of vision;" that is, there is created the illusion of persons or objects in motion or action.

32 2. To produce such films in the ordinary manner the Kalem Company uses a high speed camera before which persons and objects act and move, and in which a strip or film of celluloid or similar material is rapidly moved across the lens, and the photographing apparatus is so manipulated that a long series of photographs is taken upon the film at rapidly recurring intervals of time. The product of this camera is known as a "negative film" since it contains a long series of negative photographs.

3. From this negative film a positive film is prepared or printed in a manner generally similar to that in which ordinary photographic positives are printed from negatives: each of such positive films is provided on each edge with a series of perforations which, in the exhibiting machines, engage with sprocket wheels which are so arranged as to drive or move the film across the lens or sight aperture of the exhibiting machines, the arrangement of which is such that the film with the positive photographs is driven at great speed, and during the operation the film is and remains a part of the exhibiting machine.

4. The exhibiting machines in common use are of various sorts and put to various uses. Among others, there are projecting machines which cast the pictures upon a screen; these are in common use in places of public amusement to which a small admission fee is charged, called "theatoriums," or the like. Other projecting machines are used in schools and other educational institutions, and special types are made for use in homes. Other machines using the same films do not project the pictures, but pass them rapidly across a sight opening or peep-hole where they may be inspected by individuals as distinguished from audiences. The pictures taken upon the negative films may also be produced upon successive

33 leaves of thumb books which, by suitable manipulation, can be made to cause the illusion of action or motion.

5. That the theatoriums referred to are places of amusement, having an auditorium, to which an admission fee of five or ten cents only is charged, but differing from a theatre in that while many have a stage and curtain, all lack scenery. That of these theatoriums there are several hundred in the Southern District of New York, and many thousands throughout the various cities of the United States. That theatres within the jurisdiction of this Court and throughout the United States give exhibitions of what are termed "moving pictures"; that these exhibitions are advertised extensively and publicly, and are given daily and nightly. That theatoriums are licensed as places of public exhibition and amusement, and catered to and patronized by theatre-goers desiring to witness public exhibitions and representations at cheap prices and by others. That ordinarily no scenery or curtain is used in the display of moving pictures in theatoriums, they being thrown or projected upon a white screen, after the manner of magic lantern pictures.

6. That the Kalem Company does not itself manage or give representations in any theatres or theatoriums, nor is it connected with

any such representations other than as herein stipulated, but sells its films as articles of commerce particularly to jobbers, such as Kleine Optical Company, named as a party defendant in the bill of complaint. These jobbers acquire the films, as the Kalem Company knows, for the purpose of distributing the same to the trade and their ultimate users, including places of amusement, such as theatres and theatoriums, the largest demand however for the said films coming from theatoriums. That in order to create a demand for its films and their use in theatres and theatoriums and places of exhibition, and to advertise the same in the trade, the Kalem
34 Company extensively distributes postal cards and advertising circulars such as exhibits "E" and "F" annexed to the bill of complaint, and postals similar to said exhibits were sent by the Kalem Company to many hundreds interested in the moving picture business, including managers or proprietors of theatres and theatoriums throughout the United States.

7. It is the custom in the moving picture trade to designate a film such as those above described as "a photograph" or "a film" and to copyright the same by registering it as "a photograph." That such practice as to copyright obtains even where the story and scenario are original with concerns like the Kalem Company which produce such photographs, it being the fact that much of the business of the said Kalem Company and of others is in the production and photographing of such original scenes and in the sale and rent of photographs thereof after such photographs have been so copyrighted.

8. The Kalem Company procured one Gene Gauntier to read the complainant's book "Ben Hur" (not the drama described in the bill, of which defendant and Gauntier had no knowledge) and to write out a description or abstract of certain portions of the said book which are described on Exhibit "E" attached to the bill of complaint in such form and substance that said description could be closely followed in action. Thereafter it procured certain persons and animals and their accoutrements, etc., and caused to be performed the actions and motions prescribed by said Gauntier, and during the performance defendant caused a negative moving picture film to be taken by its own apparatus in the manner above described, using the special and high skill and long-training of its employees that is requisite for the successful taking of moving pictures. Thereafter, the defendant caused its specially skilled employees to repro-
35 duce from said negative films suitable positives for exhibition, and the said Kalem Company sold and disposed of the said positive films in the ordinary course of business, the vendees thereof acquiring ownership of such films as articles of commerce, and for such uses as said vendees should desire. That said pictures correctly represent sufficient of the story of "Ben Hur" to be readily identified. When the said pictures were taken the Kalem Company expected that the said films or some or all of them would be put to various uses to which moving pictures can be put as above described, including exhibition in theatoriums and theatres.

9. Many of the said positive films were ultimately sold to and

used in theatres and theatoriums, and other places of amusement charging admission to the public. That the said theatres and theatoriums may rent or hire the said films for the purpose of public exhibition of the said moving pictures at a small sum per week, and most of the public places of exhibition using the said films use them for but one week, when the exhibition is changed. That the said exhibitions are given in said places of public amusement under the name or title of "Ben Hur," but so advertised without the defendant's protest. That the number of such exhibitions has been at least five hundred.

10. That on or about March 11, 1908, one Thomas F. Garrity called upon the secretary and treasurer of the Kalem Company at its place of business in the Southern District of New York, and stated that he desired to give a production of "Ben Hur" by means of moving pictures, and that the said Garrity was informed by the defendant's secretary and treasurer that the defendant did not sell the films to individuals, and referred him to the Kleine Optical Company where he could doubtless learn the name of an ex-
36 hibitor who had purchased the films, and could give the exhibition desired.

11. That if the officers of the Kalem Company were called as witnesses they would testify that they did not intend to violate the rights of the complainants, or any of them, but that their intention was to obtain pictures of the sort called moving pictures of the incidents and story of "Ben Hur," and to create a demand for such moving pictures for various purposes to which moving pictures can be put as above described, and to sell the same for profit, and that the further intention was to get actual pictures of a real chariot race, and not a mechanical representation, which alone is possible in a stage performance, and that the live horses dragging chariots were driven for the purpose of being photographed as above described; that the principal demand in the trade is for films containing story-telling pictures as distinguished from films portraying passing events of actual life; and that in most of its business the Kalem Company, through its officers and employees, causes scenarios and descriptions to be prepared, actors to be employed and drilled in getting up productions for the sole purpose of having them photographed by the moving picture apparatus of the Kalem Company, and from such negative photographs to prepare positives for sale; that all the work of photographing and reproduction requires special artistic skill and a high degree of training.

12. That the following letters passed between the parties to this suit prior to its commencement:

"NEW YORK, *Dec.* 7/07.

"The Kalem Co., 131 W. 34th St., City.

"GENTLEMEN: This is to notify you that your moving picture of 'Ben Hur' is a violation of our rights and our contract
37 with the Harper Bros., to 'Ben Hur' and its title for exhibition purposes. We shall hold you, through our attorneys, to strict accountability for this.

Very truly yours,

KLAW & ERLANGER."

"DEC. 9, '07.

"Klaw & Erlanger, New Amsterdam Theatre Bldg., New York City.

"GENTLEMEN: Replying to yours of the 7th would say that we have no moving picture entitled 'Ben Hur.' We have, however, in process a series of spectacles based on Gen. Lew Wallace's book which we expect to put out under the title of a 'Roman Spectacle.' These pictures are in no respect similar to your dramatization; they are not covered by any dramatic rights that you may have. As a matter of fact, they are so abbreviated that were they to be put out under the title of 'Ben Hur' they would constitute a most desirable advertisement for your dramatic production. We have proceeded most carefully in this matter under as competent legal advice to be found in this country under copyright law. Should your attorney care to discuss the matter with us prior to your taking any action we will be most pleased to see him. We trust you will consider very carefully the prospective advertising value referred to above, and we will be most pleased to show the pictures privately to a representative of your company whenever you may choose to have such a person call.

Very truly yours,

KALEM COMPANY, INC.,
Per —— ——."

38 "NEW YORK, *Dec.* 10/07.

"The Kalem Co., 131 W. 24th St., City.

"GENTLEMEN: We have yours of the 9th, and thank you for your promptness in the matter. We have referred it to Harper Bros.

Very truly yours,

KLAW & ERLANGER."

"DECEMBER 9, 1908.

"DEAR SIRS: We have seen an announcement by your company of a representation of 'Ben Hur,' in sixteen magnificent scenes, advertised as 'positively the most superb moving picture spectacle ever produced in America,' with a list of scenes and certain characters taken from Gen. Lew Wallace's story 'Ben Hur.'

Gen. Lew Wallace's story 'Ben Hur.'

"We hereby notify you that any such performance is a violation of our rights as owners of the copyright of that book, and of the rights of Messrs. Klaw & Erlanger, who have the sole right of dramatic representation thereof under an agreement with the late General Wallace and ourselves. We request you therefor to cease giving any such entertainment and to account to Messrs. Klaw & Erlanger and ourselves for your receipts from performances of the same which you may have already given.

"Your acknowledgment of the receipt of this letter by return mail will oblige,

Yours very truly,

HARPER & BROTHERS.

Kalem Company, 131 West 24th St., New York City."

39 13. That in the event that the Circuit Court shall overrule the plea the defendant waives its right to answer and consents to a final decree sustaining the bill of complaint; and the parties agree that the amount actually in controversy arising out of the present cause of action and other causes of action of like nature between the parties largely exceeds one thousand dollars, exclusive of interest and costs.

Dated New York, October 31st, 1908.

JOHN LARKIN,
Counsel for Complainant- Harper & Brothers and Wallace.

DAVID GERBER,
Counsel for Complainants Klaw & Erlanger.

JOHN LARKIN,
DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainants.

DRURY W. COOPER,
Counsel for Defendant, Kalem Company.

KERR, PAGE, COOPER & HAYWARD,
Solicitors for Defendant, Kalem Company.

(Endorsed:) United States Circuit Court, Southern District of New York, in Equity, No. 2-160.—Harper & Brothers, et al. vs. Kalem Company.—Stipulation.—Kerr, Page, Cooper & Hayward, Sol'rs for Def't, 149 Broadway, New York City.—U. S. Circuit Court, Southern District N. Y.—Filed Nov. 2, 1908.—John A. Shields, Clerk.

40 At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the said Second Circuit, Held in the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 2d Day of November, 1908.

Present: Hon. E. Henry Lacombe, Circuit Judge.

HARPER & BROTHERS, MARC KLAW and ABRAHAM L. ERLANGER, Composing the Firm of Klaw & Erlanger, and Henry L. Wallace, as Administrator of the Goods, Chattels, and Effects of Susan E. Wallace, Deceased, Complainants,

against

KALEM COMPANY, Defendant.

This cause came on to be heard at this Term, upon the Bill of Complaint, the plea of the defendant Kalem Company, the replication of the complainants and the agreed statement of facts, and the defendant Kalem Company having consented that if the plea be overruled, it waives its right to answer the bill of complaint, and the cause having been argued by counsel;

Now, therefore, upon consideration of the said Bill and the plea thereto of the defendant Kalem Company, the replication
41 of the complainants and the said agreed statement of facts, it is, by the court

Ordered, adjudged and decreed as follows, to wit:

That the statement of facts as stipulated by counsel for the complainants and defendant be and they hereby are, made the findings of fact of this Court; and it is further

Ordered, adjudged and decreed, that the plea of the defendant Kalem Company, be and it is hereby in all respects overruled, and it is further

Ordered, adjudged and decreed, that as the said defendant, Kalem Company, has duly waived its right to answer the said bill of complaint, that the said Kalem Company, its agents, servants, licensees, employees, and any other person acting under its direction, control or permission, be and they are hereby perpetually enjoined and restrained from in any manner or by any means producing, playing, exhibiting, printing, publishing, translating, copying, advertising or causing or licensing to be produced, represented, played, exhibited, printed, published, translated, copied, adapted, or advertised, or otherwise exercising or assuming to exercise or assume any control, ownership or dominion of, in, to or over the book entitled "Ben Hur," "A Tale of the Christ," or the dramatic composition entitled "Ben Hur," or any of its characters, scenes, incidents, plot or story, or any simulated or colorable imitation or adaptation from the said book, or dramatic composition of "Ben Hur," or otherwise; and it is further

Ordered, adjudged and decreed, that the complainants herein recover of the defendant Kalem Company, the costs and disbursements of this action to be taxed by the Clerk of this Court.

E. HENRY LACOMBE,
U. S. C. J.

Approved as to form.

KERR, PAGE, COOPER & HAYWARD,
Sol'rs for Defendant Kalem Co.

42 (Endorsed:) Circuit Court of United States, Southern District of New York.—Harper & Brothers et al., Complainants, against Kalem Company, Defendant.—Decree.—Dittenhoefer, Gerber & James, Attorneys for Compl'ts, Klaw & Erlanger, 96 Broadway, New York.—U. S. Circuit Court, Southern District N. Y.—Filed Nov. 2, 1908.—John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.
In Equity.

HARPER BROTHERS, MARC KLAW and ABRAHAM ERLANGER, Composing the Firm of Klaw & Erlanger, and Henry L. Wallace, as the Administrator of the Goods, Chattels, and Effects of Susan E. Wallace, Deceased, Complainants,

vs.

KALEM COMPANY and KLEINE OPTICAL COMPANY, Defendants.

Petition of Appeal.

Kalem Company, one of the defendants named in the above-entitled suit, conceiving itself aggrieved by the final decree made and entered into therein on the 2d day of November, 1908, does hereby appeal from the said final decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the
43 assignment of errors, which is filed herewith, and it prays that this appeal may be allowed and a citation granted, directed to the above-named complainants Harper Brothers, Marc Klaw and Abraham Erlanger, composing the firm of Klaw & Erlanger, and Henry L. Wallace, as administrator, etc., commanding them to appear before the United States Circuit Court of Appeals for the Second Circuit, and to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which the said decree was made, may be duly authenticated and sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated New York, November 5th, 1908.

KALEM COMPANY,
By KERR, PAGE, COOPER & HAYWARD,
Its Solicitors.

The foregoing petition of appeal is allowed this 5th day of November, 1908.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States Circuit Court, Southern District of New York.—In Equity, No. 2-160.—Harper Brothers et al. vs. Kalem Company et al.—Petition of Appeal.—Kerr, Page, Cooper & Hayward, Sol'rs for Def't, 149 Broadway, New York City.—Service of copy of within petition of appeal admitted the 6th day of November, 1908. Dittenhoefer, Gerber & James, John Larkin, Sol'rs for Compl'ts.—U. S. Circuit Court, Southern District, N. Y.—Filed Nov. 6, 1908.—John A. Shields, Clerk.

44 United States Circuit Court, Southern District of New York.
In Equity.

HARPER BROTHERS, MARC KLAW and ABRAHAM ERLANGER, Composing the Firm of Klaw & Erlanger, and Henry L. Wallace, as the Administrator of the Goods, Chattels, and Effects of Susan E. Wallace, Deceased, Complainants,

vs.

KALEM COMPANY and KLEINE OPTICAL COMPANY, Defendants.

Assignment of Errors.

Kalem Company, one of the parties named as defendants in the above-entitled suit, conceiving itself aggrieved by the final decree entered therein on the 2nd day of November, 1908, now appears by its solicitors and presents, with its accompanying petition of appeal from the said order, the following assignment of errors:

First. The Court erred in that it entered a decree sustaining the prayers of the bill of complaint against the Kalem Company.

Second. The Court erred in that it found that Kalem Company has infringed upon any copyright of the complainants or any of them.

Third. The Court erred in that it found that Kalem Company has contributed in any infringement of the complainants' copyright.

45 Fourth. The Court erred in that it found that Kalem Company has publicly performed or represented any dramatic composition for which a copyright has been obtained by the complainants, or any of them.

Fifth. The Court erred in that it found that Kalem Company has contributed toward publicly performing or representing any dramatic composition for which a copyright has been obtained by the complainants, of any of them.

Sixth. The Court erred in that it held the taking of a series of photographs to constitute an infringement upon the copyright to the book or drama "Ben Hur."

Seventh. The Court erred in that it held the sale of a series of photographs to constitute an infringement upon the copyright to the book or drama "Ben Hur."

Eighth. The Court erred in that it did not hold that the making of the series of photographs by the defendant does not constitute an infringement upon the copyright to the book or drama "Ben Hur."

Ninth. The Court erred in that it did not hold that the making of copies of the series of photographs by the defendant does not constitute an infringement upon the copyright to the book or drama "Ben Hur."

Tenth. The Court erred in that it did not hold that the sale of the series of photographs by the defendant does not constitute an infringement upon the copyright to the book or drama "Ben Hur."

Eleventh. The Court erred in that it did not hold that the use

46 of the copies of the series of photographs made by the defendant in and as a part of a machine or apparatus does not constitute an infringement upon the copyright to the book or drama "Ben Hur."

Twelfth. The Court erred in that it did not hold as a matter of law that copyright of an unillustrated book or drama does not protect the proprietor thereof against the making or exhibiting of pictures of scenes described in such book or drama.

Thirteenth. The Court erred in that it did not hold as a matter of law that the Constitution of the United States does not include as a part of the writings of an author, when copyrighted, the exclusive right of public performance or representation of a dramatic version thereof.

Fourteenth. The Court erred in that it did not hold as a matter of law that the Constitution of the United States does not include as a part of the writings of an author, when copyrighted, the sole or exclusive right to make or exhibit pictures of the unillustrated scenes described therein.

Fifteenth. The Court erred in that it did not dismiss the bill of complaint, with costs, for want of equity.

Dated New York, November 5, 1908.

KERR, PAGE, COOPER & HAYWARD,
Solicitors and of Counsel for Defendant
Kalem Company.

(Endorsed:) United States Circuit Court, Southern District of New York.—In Equity, No. 2-160.—Harper Brothers et al. vs. Kalem Company et al.—Assignment of Errors.—Kerr, Page, Cooper & Hayward, Sol'rs for Def't, 149 Broadway, New York City.—U. S. Circuit Court, Southern District, N. Y.—Filed Nov. 5, 1908.—John A. Shields, Clerk.

47 National Surety Company.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

HARPER BROTHERS, MARC KLAW and ABRAHAM ERLANGER, Composing the Firm of Klaw & Erlanger, and Henry L. Wallace, as the Administrator of the Goods, Chattels and Effects of Susan F. Wallace, Deceased, Complainants,

vs.

KALEM COMPANY and KLEINE OPTICAL COMPANY, Defendants.

Bond for Damages and Costs.

Know all men by these presents, That the National Surety Company, having an office and principal place of business at No. 115 Broadway, in the City of New York, County and State of New York, is held and firmly bound unto the above named complainants, Harper & Brothers, Klaw & Erlanger and Henry L. Wallace, as Administra-

tor, etc., in the sum of two hundred and fifty ($250) dollars, to be paid to the said Harper & Bros., Klaw & Erlanger and Henry L. Wallace, as Administrator, etc., for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents. Sealed with its seal,
48 and dated the 4th day of November, in the year of our Lord one thousand nine hundred and eight.

Whereas, the above named Kalem Company and Kleine Optical Company, have prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the final decree rendered in the above entitled suit, by the Judge of the Circuit Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that the above named Kalem Company and Kleine Optical Company shall prosecute said appeal to effect, and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Sealed and delivered, and taken and acknowledged this 4th day of November, 1908, before me.

NATIONAL SURETY COMPANY,
[SEAL.] By ARTHUR P. WEST,
Res. Vice-President.

Attest:

WM. A. THOMPSON,
Ass't Secretary.

Copy of By-Law.

Be it remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the 6th day of Feb., 1900, a quorum being present, the following By-Law was adopted:

"ARTICLE XIII., SEC. 1. All bonds, recognizances, contracts of "indemnity and other writings obligatory in the nature thereof, "shall be signed by the President, the Vice-President, the Sec-
"ond Vice-President, a Resident Vice-President, or an
49 "attorney in fact, and, except when signed by an attorney "in fact, shall have the seal of the Company affixed thereto, "duly attested by the Secretary, Assistant Secretary or a Resident "Assistant Secretary. The Vice-President, Second Vice-President "and Resident Vice-Presidents shall each have authority to sign such "instruments whether the President be absent or incapacitated or "not; and the Assistant Secretary and Resident Assistant Secretaries "shall each have authority to seal and attest such instruments, "whether the Secretary be absent or incapacitated or not. All such "instruments executed as herein provided shall be as binding upon "the Company as if the same were signed by the President, duly "sealed and attested by the Secretary."

CITY AND COUNTY OF NEW YORK, *ss:*

I, Wm. A. Thompson, Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original By-Law.

Given under my hand and the seal of the Company, at the City of New York, this 4th day of November, 1908.

[SEAL.] WM. A. THOMPSON,
Assistant Secretary.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 4th day of November, 1908, before me personally appeared Arthur P. West, Res. Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the City of New York; that he is the Res. Vice-President of the National Surety Company; that he knows the corporate seal of said Company; that
50 the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Res. Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720 of New York Session Laws of 1893. And the said Arthur P. West further said that he is acquainted with Wm. A. Thompson, and knows him to be the Assistant Secretary of said Company; that the signature of the said Wm. A. Thompson subscribed to the said instrument is in the genuine handwriting of the said Wm. A. Thompson, and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Arthur P. West, Res. Vice-President.

[SEAL.] JOHN HOLMES,
Notary Public, Queens Co.

Cert. filed in N. Y. Co.

(Endorsed:) Circuit Court.—Harper Brothers and others, Complainants, against Kalem Company and ano., Defendants.—Bond for Damages and Costs.—Surety: National Surety Company.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the Complainant of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally.—E. H. Lacombe, U. S. Circuit Judge.—U. S. Circuit Court, Southern District of N. Y.—Filed Nov. 5, 1908.—John A. Shields, Clerk.

51 *Citation.*

United States of America to Harper Brothers, Marc Klaw, Abraham Erlanger and Henry L. Wallace, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Second

Circuit, to be holden at the Borough of Manhattan, New York City, on the 4th day of December, 1908, pursuant to an appeal filed in the Clerk's office of the U. S. Circuit Court for the Southern District of New York, wherein Kalem Company is appellant and you are appellees, to show cause, if any there be, why the final decree entered against the said appellant on the 2d day of November, 1908, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 5th day of November, 1908, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America the one hundred and thirty-third.

E. H. LACOMBIE,
U. S. Circuit Judge.

Due and timely service of this citation is acknowledged on behalf of Harper Brothers, Marc Klaw and Abraham Erlanger, composing the firm of Klaw & Erlanger, and Henry L. Wallace, this 5th day of November, 1908.

DITTENHOEFER, GERBER & JAMES,
JOHN LARKIN,
Solicitors and of Counsel for Complainants.

(Endorsed:) United States Circuit Court, Southern District of New York.—In Equity.—No. —.—Harper Brothers, et al.,
52 vs. Kalem, et al.—Citation.—Kerr, Page, Cooper & Hayward, Sol'rs for Def't, 149 Broadway, New York City.—Service of a copy of the within citation admitted the 6th day of November, 1908.—Dittenhoefer, Gerber & James.—John Larkin, Solicitor for Complainants.—U. S. Circuit Court, Southern District N. Y.—Filed Nov. 6, 1908.—John A. Shields, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to fifty-four, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Harper Brothers, Marc Klaw, Abraham Erlanger and Henry L. Wallace, Complainants-Appellees, against Kalem Company, Defendant-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 21st day of November, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the said United States the one hundred and thirty-third.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

53 United States Circuit Court of Appeals for the Second Circuit.

No. 159. October Term, 1908.

Argued February 18, 1909. Decided March 16, 1909.

HARPER BROTHERS et al., Complainants—Appellees,
vs.
THE KALEM COMPANY, Impleaded, etc., Defendant—Appellant.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Before Coxe, Ward and Noyes, Circuit Judges.

WARD, *Circuit Judge.*

The late General Lew Wallace wrote a story called Ben Hur, the copyright of which belongs to the complainants Harper & Brothers. The Complainants Klaw & Erlanger caused the story to be dramatized and Harper & Brothers duly copyrighted the dramatization and thereupon granted Klaw & Erlanger the sole right of producing the same upon the stage. The defendant, The Kalem Company, also employed a writer to read the story, without having any knowledge of the copyrighted drama, and to write a description of certain portions of it. It then produced persons and animals with their accoutrements to perform the actions and motions so described. During this performance a film of celluloid was rapidly moved across the lens of a high speed camera on which a series of negative photographs were taken from which a positive film
54 suitable for exhibition purposes was reproduced. These positive photographs were contained on one film about a thousand feet long which being driven at great speed across the lens of an exhibiting machine projects all the motions of the original actors and animals in succession upon a screen. The defendant advertises this film as suitable for giving public exhibitions of the story of Ben Hur, and sent advertisements to, among other persons, proprietors of theatoriums. At least five hundred exhibitions have been given in such theatoriums, an entrance fee being charged. The defendant did not reproduce the whole story but only certain of the more prominent scenes such as the wounding of the Roman Procurator, Ben Hur in the Galleys, the Chariot Race, and others. It does not itself give any public or private exhibitions, but simply sells or licenses the use of the films. A final decree granting a perpetual injunction was entered in the court below from which this appeal is taken.

Section 4952 U. S. Rev. Stat. gives the author of a book and his assigns not only the sole right of printing but also the sole right of dramatizing it, and in case of a dramatic composition the sole right of performing or representing it publicly.

Section 4964 subjects anyone who shall dramatize a copyrighted

book without the written consent of the proprietor to the payment of damages.

Section 4966 provides that anyone who publicly performs or represents a copyrighted dramatic composition without the owner's consent shall be liable for damages not less than $100 for the first and $50 for every subsequent performance and if his conduct be willful and for profit, he shall also on conviction be imprisoned for not exceeding one year.

Two questions are raised. First, did the defendant by taking this series of photographs dramatize Ben Hur in violation of Harper & Brothers' sole right to dramatize the book under Section 4952. Second, is the exhibition of these photographs by means of an exhibiting machine in theatoriums where an entrance fee is charged a public performance or representation of a dramatic composition in violation of the rights of Harper & Brothers as owners of the
55 copyright of the book and of the dramatic composition and of the rights of Klaw & Erlanger as owners of the perfarming right under Section 4966.

There may be several dramatizations of the same story, each capable of being copyrighted. Harper & Brothers having given Klaw & Erlanger the sole right of performing the particular copyrighted drama can give some one else the sole right of performing a different dramatic composition of the story; Drone on Copyright, p. 597, whereas Klaw & Erlanger, who are the owners only of the right publicly to perform the particular copyrighted drama have no right to make another dramatization. Consequently infringing the copyrighted drama is a different thing from infringing the owner's right to dramatize the copyrighted book.

Answering the first question: The series of photographs taken by the defendant constitutes a single picture capable of copyright as such, Edison v. Lubin, (122 F. R. 240); American Mutoscope Co. v. Edison, (137 F. R. 262), and as pictures only represent the artist's idea of what the author has expressed in words, Parton v. Pray, (3 Clifford 537), they do not infringe a copyrighted book or drama and should not as a photograph, be enjoined. This distinction between infringement of a copyright of a book and of the performing rights is like the distinction in respect to an infringement between perforated music rolls and sheet music discussed in the case of the White-Smith Co. v. The Apollo Co. (209 U. S. 1), where the court said:

"There is no complaint in this case of the public performances of copyrighted music nor is the question involved whether the manufacturers of such perforated music rolls when sold for use in public performances might be held as contributory infringers."

Coming now to the second question: When the film is put on an exhibiting machine which reproduces the action of the actors and animals we think it does become a dramatization and infringes the exclusive right of the owner of the copyrighted book to dramatize it as well as his right as owner of the copyrighted drama and of Klaw & Erlanger's right as owners of the performing right
56 publicly to produce it. In other words, the artist's idea of describing by action the story the author has written in words

is a dramatization. It is not necessary that there should be both speech and action in dramatic performances although dialogue and action usually characterize them. Judge Blatchford said on this point in Daly v. Palmer, (6 Blatch. 256):

"To act, in the sense of the statute, is to represent as real, by countenance, voice or gesture, that which is not real. A character in a play who goes through with a series of events on the stage without speaking—if such be his part of the play—is none the less an actor in it than one who in addition to motions and gestures, uses his voice. A pantomime is a species of theatrical entertainment in which the whole action is represented by gesticulation without the use of words."

And this court, in the case of Daly v. Webster, (56 F. R. 483), said:

"Upon the main point of the case, namely, whether the combination or series of dramatic events (apart from the dialogue) which makes up the particular scene or portion of the play claimed to be infringed, is a dramatic composition, and as such entitled to protection under the copyright laws, it is necessary to add but little to the exhaustive opinion of Judge Blatchford, reported in Daly v. Palmer, (6 Blatch. 256). The same scene in the same play is elaborately discussed by him, and in his conclusion that it is a dramatic composition, we concur. In plays of this class the series of events is the only composition of any importance. The dialogue is unimportant, and as a work of art, trivial. The effort of the composer is directed to arranging for the stage a series of events so realistically presented, and so worked out by the display of feeling or earnestness on the part of the actors, as to produce a corresponding emotion in the audience. Such a composition, though its success is largely dependent upon what is seen, irrespective of the dialogue, is dramatic. It tells a story which is quite as intelligible to the spectator as if it had been presented to him in a written narrative."

57 It can hardly be doubted that if the story were acted without dialogue the performance would be a dramatization of the book and we think that if the motions of the actors and animals were reproduced by moving pictures this would be only another form of dramatization. If the defendant had taken a series of moving pictures of the play as actually performed by Klaw & Erlanger, the exhibition of them would certainly be an infringement of the dramatic composition because it would tell the story as they tell it within the decision of Daly v. Palmer and Daly v. Webster, *supra*.

It is next objected that the defendant cannot be held as a contributory infringer because its films are capable of innocent use, *e. g.* exhibitions for private amusement. This fact only compels the complainants to prove that the defendant does promote a guilty use of them. Inasmuch as it advertises the films as capable of producing a moving picture spectacle of Ben Hur and sends its advertisements to proprietors of theatoriums with the expectation and hope that they will use them for public exhibitions, charging an entrance fee, and inasmuch as many of these proprietors have so used them, the defendant is clearly guilty of contributory infringement.

Finally, the defendant relies upon Section 8, Art. 1 of the Constitution that Congress shall have the power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

It is argued from this that as these moving pictures only express the artist's conception of the author's ideas as expressed in the words of the copyrighted book or dramatic composition, they cannot be said to infringe the author's rights. But the history of the Copyright Law does not justify so narrow a construction of the word "writings." The first copyright law of 1790, 1 Stat. at Large, 94, included maps and charts as well as books. In 1802, 2 Stat. at Large, 171, copyright was extended to engravings, etchings and prints. In 1856, 11 Stat. at Large, 138, it was extended in the case of copyrighted dramatic compositions to the right of publicly performing the same. In 1870, 16 Stat. at Large, 212, it was extended to paintings, drawings, chromos, statues, models, designs, photographs, and the nega-
58 tives thereof, and authors were also allowed to reserve the right to dramatize their work. In 1891, Sec. 4952, U. S. Rev. Stat. authors and their assigns were given the exclusive right to dramatize their copyrighted works. The construction of the word writings to cover these various forms of expression and also to cover the right of giving public performances has been acquiesced in for over fifty years. In view of this fact we have no difficulty in concluding that moving pictures would be a form of expression infringing not the copyrighted book or drama, but infringing the author's exclusive right to dramatize his writings and publicly to perform such dramatization.

Decree affirmed.

Drury W. Cooper, for Appellant.
David Gerber and John Larkin, for Appellees.

59 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit. Held at the Court Rooms in the Post Office Building in the City of New York, on the 26th day of March One Thousand Nine Hundred and Nine.

Present: Hon. Alfred C. Coxe, Hon. Henry G. Ward, Hon. Walter C. Noyes, Circuit Judges.

HARPER BROTHERS et al., Complainants-Appellees,
vs.
KALEM COMPANY, Impleaded, etc., Defendant-Appellant.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

H. G. W.

60 Endorsed: United States Circuit Court of Appeals, Second Circuit. Harper Bros. vs. Kalem Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 26, 1909. William Parkin, Clerk.

61 United States Circuit Court of Appeals, for the Second Circuit.

HARPER BROTHERS, MARC KLAW and ABRAHAM ERLANGER, Composing the Firm of Klaw & Erlanger, and Henry L. Wallace, as the Administrator of the Goods, Chattels and Effects of Susan E. Wallace, Deceased, Appellees.

vs.

KALEM COMPANY, Appellant.

Petition of Appeal to the Supreme Court of the United States.

The above-named appellant, Kalem Company, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Second Circuit, and that a decree has been rendered on the 26th day of March, 1909, affirming the final decree of the Circuit Court of the United States for the Southern District of New York, and that the matter in controversy in said suit exceeds one thousand dollars, besides interest and costs; that this cause is one in which the United States Circuit Court of Appeals for the Second Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on Appeal. Wherefore said appellant prays that this appeal may be allowed and a citation granted, directed to the above-named appellees Harper Brothers, Marc Klaw and Abraham Erlanger composing the firm of Klaw & Erlanger, and Henry L. Wallace, as administrator, etc., commanding them to appear before the Supreme Court of the United States, and to do and receive what may
62 appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which the said judgment was rendered may be duly authenticated and sent to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

Dated, New York, March 27th, 1909.

KALEM COMPANY,
By KERR, PAGE, COOPER & HAYWARD,
DRURY W. COOPER,
Solicitors & of Counsel.

It is hereby ordered that the appeal in the above-entitled cause to the Supreme Court of the United States be and is hereby allowed as prayed this 27th day of March, 1909.

H. G. WARD, *U. S. C. J.*,
Judge of U. S. Circuit Court of Appeals for the Second Circuit.

63 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. Harper Brothers et al. vs. Kalem Company. Petition of Appeal to the Supreme Court of the United States. Kerr, Page, Cooper & Hayward, Solicitors for Appellant, 149 Broadway, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 29, 1909. William Parkin, Clerk.

64 United States Circuit Court of Appeals for the Second Circuit.

HARPER BROTHERS, MARC KLAW and ABRAHAM ERLANGER, Composing the Firm of Klaw & Erlanger, and Henry L. Wallace, as the Administrator of the Goods, Chattels and Effects of Susan E. Wallace, Deceased, Appellees,

vs.

KALEM COMPANY, Appellant.

Assignment of Errors.

The above named appellant, Kalem Company, having appealed to the Supreme Court of the United States from the decree of this Court made and entered in the above entitled cause and filed in the office of the Clerk of this Court on the 26th day of March, 1909, respectfully alleges and makes the following assignment of errors herein:

First. The Court erred in that it entered a decree sustaining the prayers of the bill of complaint against the Kalem Company.

Second. The Court erred in that it found that Kalem Company has infringed upon any copyright of the appellees or any of them.

Third. The Court erred in that it found that Kalem Company has contributed in any infringement of the appellees' copyright.

Fourth. The Court erred in that it found that Kalem Company has dramatized the copyrighted book of appellees, or any of them.

65 Fifth. The Court erred in that it found that Kalem Company has publicly performed or represented any dramatic composition for which a copyright has been obtained by the appellees, or any of them.

Sixth. The Court erred in that it found that Kalem Company has contributed toward publicly performing or representing any dramatic composition for which a copyright has been obtained by the appellees, or any of them.

Seventh. The Court erred in that it held the taking of a series of photographs to constitute an infringement upon the copyright to the book or drama "Ben Hur."

Eighth. The Court erred in that it held the sale of a series of photographs to constitute an infringement upon the copyright to the book or drama "Ben Hur."

Ninth. The Court erred in that it did not hold that the making of the series of photographs by the appellant does not constitute an infringement upon the copyright to the book or drama "Ben Hur."

Tenth. The Court erred in that it did not hold that the making of copies of the series of photographs by the appellant does not constitute an infringement upon the copyright to the book or drama "Ben Hur."

Eleventh. The Court erred in that it did not hold that the sale of the series of photographs by the appellant does not constitute an infringement upon the copyright to the book or drama "Ben Hur."

Twelfth. The Court erred in that it did not hold that the use of the copies of the series of photographs made by the appellant in and as a part of a machine or apparatus does not constitute an
66 infringement upon the copyright to the book or drama "Ben Hur."

Thirteenth. The Court erred in that it did not hold as a matter of law that copyright of an illustrated book or drama does not protect the proprietor thereof against the making or exhibition of pictures of scenes described in such book or drama.

Fourteenth. The Court erred in that it did not hold as a matter of law that the Constitution of the United States does not include as a part of the writings of an author, when copyrighted, the exclusive right of public performance or representation of a dramatic version thereof.

Fifteenth. The Court erred in that it did not hold as a matter of law that the Constitution of the United States does not include as a part of the writings of an author, when copyrighted, the sole or exclusive right to make or exhibit pictures of the unillustrated scenes described therein.

Sixteenth. The Court erred in that it did not direct that the bill of complaint be dismissed, with costs, for want of equity.

Dated New York, March 27th, 1909.

KERR, PAGE, COOPER & HAYWARD,
DRURY W. COOPER,
Solicitors and of Counsel for Defendant,
Kalem Company.

67 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. Harper Brothers et al. vs. Kalem Company. Assignment of Errors. Kerr, Page, Cooper & Hayward, Solicitors for Appellant, 149 Broadway, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 29, 1909. William Parkin, Clerk.

68 United States Circuit Court of Appeals for the Second Circuit.
In Equity.

HARPER & BROS., MARC KLAW and ABRAHAM ERLANGER, Composing the Firm of Klaw & Erlanger, and Henry L. Wallace, as the Administrator of the Goods, Chattels and Effects of Susan E. Wallace, Deceased, Appellees,

against

KALEM COMPANY, Appellant.

Know all men by these presents, that we the National Surety Company, a corporation under the laws of the State of New York, having an office and principal place of business at No. 115 Broadway, Borough of Manhattan, City of New York, are held and firmly bound unto Harper & Bros., Marc Klaw and Abraham Erlanger, composing the firm of Klaw & Erlanger, and Henry L. Wallace, as the Administrator of the goods, chattels and effects of Susan E. Wallace, deceased, above named Appellees, in the sum of Two hundred and fifty ($250) Dollars, to be paid to the said Appellees, for the payment of which, well and truly to be made, we bind ourselves, and our successors, firmly by these presents.

Sealed with our seals and dated the 27th day of March, 1909.

Whereas an appeal has been allowed and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit in the above entitled case to correct the final decree in aforesaid suit and the citation directed to the above named Appellees, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, in the District Columbia, within thirty days from the date thereof.

Now, therefore, the condition of this obligation is such, that if the said Kalem Company, shall prosecute said appeal to effect, and answer all damages and costs if it fails to make its plea good.

69 then this obligation to be void; otherwise we, the National Surety Company, shall do the same for it.

NATIONAL SURETY COMPANY,
By ARTHUR P. WEST,
Resident Vice-President.

Attest:
[SEAL.] WM. A. THOMPSON,
Assistant Secretary.

70 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 27th day of March, one thousand nine hundred and nine before me personally came Arthur P. West, known to me to be the Resident Vice-President of the National Surety Company, the cor-

poration described in and which executed the within and foregoing Bond of Kalem Company as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of Kalem Company is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Resident Vice-President of said Company, and that he is acquainted with Wm. A. Thompson and knows him to be the Assistant Secretary of said Company; and that the signature of said Wm. A. Thompson subscribed to said Bond is in the genuine handwriting of said Wm. A. Thompson, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Two Million dollars.

That —— —— is our agent to acknowledge service in the Judicial District wherein this Bond is given.

ARTHUR P. WEST.
(Deponent's signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 27th day of March, 1909.

[SEAL.] ETTA R. GEWECKE,
Notary Public for County of Kings.
(Officer's signature, description and seal.)

Certificate filed in New York, Queens, Richmond, Westchester & Nassau Counties.

71 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. Harper & Bros., et al., Appellees, vs. Kalem Company, Appellant. Bond for Costs on Appeal to Supreme Court of the U. S. Approved as to form and also as to sufficiency of sureties, with reservation, however, to the Appellees of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. H. G. Ward, U. S. Circuit Judge. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 29, 1909. William Parkin, Clerk.

72 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 71 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Harper & Brothers et al., against The Kalem Company, Impleaded, etc., as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 29th day of March, in the year of our Lord One Thousand Nine Hundred and Nine and of the Independence of the said United States the One Hundred and Thirty-third.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

73 United States Circuit Court of Appeals for the Second Circuit.

HARPER BROTHERS, MARC KLAW and ABRAHAM ERLANGER, Composing the Firm of Klaw & Erlanger, and Henry L. Wallace, as the Administrator of the Goods, Chattels and Effects of Susan E. Wallace, Deceased, Appellees,

vs.

KALEM COMPANY, Appellant.

Citation.

UNITED STATES OF AMERICA:

To Harper Brothers, Marc Klaw, Abraham Erlanger and Henry L. Wallace, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, thirty (30) days after the date of this citation, pursuant to an appeal filed in the Clerk's office of the U. S. Circuit Court of Appeals for the Second Circuit, wherein Kalem Company is appellant and you are appellees, to show cause, if any there be, why the final decree entered against the said appellant on the 26th day of March, 1909, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 27th day of March, 1909, in the year of our Lord one thousand nine hundred and nine, and of the Independ-
74 ence of the United States the one hundred and thirty-third.

H. G. WARD,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

Service of this citation is acknowledged on behalf of Harper Brothers, Marc Klaw and Abraham Erlanger, composing the firm of Klaw & Erlanger, and Henry L. Wallace, this 27 day of March, 1909.

DITTENHOEFER, GERBER & JAMES,
Solicitors and of Counsel for Appellees Klaw & Erlanger.

JOHN LARKIN,
Solicitors and of Counsel for Appellees Harper & Brothers and Henry L. Wallace.

75 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Harper Brothers, et al. vs. Kalem Company. Citation. Kerr, Page, Cooper & Hayward, Solicitors for Appellant, 149 Broadway, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 29, 1909. William Parkin, Clerk.

Endorsed on cover: File No. 21,575. U. S. Circuit Court of Appeals, 2d Circuit. Term No. 184. Kalem Company, appellant, vs. Harper Brothers, Marc Klaw, Abraham Erlanger, and Henry L. Wallace. Filed March 31, 1909. File No. 21,575.

[redacted]

Supreme Court of the United States.

KALEM COMPANY, Appellant, vs. HARPER BROTHERS, MARC KLAW, ABRAHAM ERLANGER and HENRY L. WALLACE, Appellees.	No. 184. October Term, 1910.

BRIEF FOR APPELLANT.

This is an appeal from a final decree of the United States Circuit Court of Appeals for the Second Circuit, affirming a final decree of the United States Circuit Court for the Southern District of New York, in a suit for infringement of a *copyright*. The subject matter excludes the case from those in which the judgment of the Circuit Court of Appeals is made final by the Act of March 3, 1891 (26 Stat. at Large 828, Sec. 6, as amended). The matter in dispute exceeds the sum of $1,000, inclusive of interest and costs (Rec., p. 23, top). The original defendant, having failed in both of the lower courts and believing itself to be aggrieved, brings the case here for review by appeal.

STATEMENT OF THE CASE.

The suit was for an injunction to restrain alleged infringement of a copyright upon a book entitled "Ben Hur, a Tale of the Christ," written by the late General Lew Wallace, and upon a dramatic composition asserted to have been based

upon the book, and to have been copyrighted also; but the record does not disclose either the contents of the *dramatic* copyright or any correspondence between that and the defendant's doings; so that the case stands upon the book copyright alone. The record was made up by a plea which admitted the facts charged to constitute an infringement, and an agreed statement of facts. The defendant waived *answer*. Upon this record the Circuit Court entered its decree for a permanent injunction and for costs in favor of the complainants and against the defendant, from which decree successive appeals have been taken to the Circuit Court of Appeals and to this Court.[1]

It is admitted as a fact in the case that the defendant's product has been publicly exhibited more than five hundred times (Rec., p. 21); so that under the Statute (R. S., Sec. 4966), which prescribes damages of $100 for the first performance and $50 for each subsequent performance in infringement of a dramatic copyright, the measure of damages asserted by complainants against the defendant-appellant is $25,050. That sum, pursuant to the practice recognized by this Court in *Brady vs. Daly*, 175 U. S., 148, the complainants are seeking to recover by an action at law now pending in the U. S. Circuit Court for the Southern District of New York, pleading the decree in this suit as an adjudication between the parties. The outcome of that case is awaiting the determination by this Court of the questions of law involved in the present appeal.

Moreover, the fundamental questions involved are not only novel, but of far reaching importance, owing to the enormous development of the *moving picture art*. The case arose under the copyright law that preceded the Act of July 1, 1909, and the decision of that Circuit Court of Appeals was handed down three months before the act went into effect. So far as counsel are aware, the recent statute made no change that would affect the disposition of the case, if the cause of action had

[1] The parties will be denominated herein as in the bill of complaint; the appellant being generally called "defendant," and the appellees "complainants."

arisen since its passage. The fundamental question is, whether the making and exhibition of a film of *moving pictures* infringes upon the copyright of a book or the reserved rights to dramatize a copyrighted book. In no case on either side of the Atlantic, save the present one, have these propositions been passed upon, so far as counsel are aware.

The state of facts as admitted and agreed upon (Rec., pp. 18–23) for the purposes of this suit, is substantially as follows: The complainants are assumed to have complied with the statutory requirements entitling them to a copyright in the book "Ben Hur." A few months before the bill was filed the Kalem Company, a corporation of New York and engaged in the production of photographic films of the kind known as moving picture films, caused an abstract of certain portions of the copyrighted book to be written out in such form and substance that the description could be followed closely in action. It procured persons, suitably costumed and provided with accessories in the way of animals and proper accoutrements, to perform the actions and motions so prescribed During such performance defendant caused a negative moving picture film to be taken by its own apparatus, which consisted of a high speed camera in which a strip of film of celluloid, the surface of which was sensitized, was moved rapidly across the lens, the photographing apparatus being so manipulated that a long series of photographs was taken at rapidly recurring intervals of time, each photograph differing from its immediate predecessors and successors by almost imperceptible degrees, but all taken together represent in proper succession the entire series of actions and movements.

From this *negative* film the Kalem Company prepared or printed *positive* films in much the same way that ordinary photographic positives are printed from the negatives; each of the positive films being provided, however, on each edge with a series of perforations. These films are intended to be used in exhibiting machines, the mechanism of which engages with the series of perforations so as to drive the film at great speed across a lens or sight aperture. That is to say, the positive films during the time of their use are a substantial part of the machine in which they are used.

Such exhibiting machines are of various sorts, some utilizing translucent films and projecting the pictures upon a screen after the fashion of magic lanterns, and these are used in homes, schools and in places of public amusement. Other machines do not *project* the pictures, but pass an opaque film, upon which the pictures are mounted, rapidly across a peep hole or sight opening through which they may be inspected by individuals, as distinguished from audiences. Another use of the films is, to print the pictures upon the successive leaves of thumb books, which, by suitable manipulation, can be made to cause the illusion of motion or action. In all the uses to which the pictures are put, the observer is illusionized into the belief that he is seeing the persons or objects in actual motion, that illusion being due to a defect of the optic nerve usually termed "persistence of vision"; the fact being that if the slightly differing pictures are made to replace one another more rapidly than, say, 10 to the second, the eye does not perceive the replacement but the image of each picture blends into its successor, so to speak, the general outlines being retained upon the retina and the changes in details appearing to the eye to be actual movements of the persons and objects portrayed.

These positive films the Kalem Company sold to jobbers who in turn sold them to the ultimate users, the largest demand coming from "theatoriums"—a term used to indicate "moving picture shows." In order to create a demand for the pictures, the Kalem Company issued advertising circulars such as are found between pages 12 and 13 of the record, the first of which refers to the films as showing "positively the most superb moving picture spectacle ever produced in America" and identifying it by the title "Ben Hur" and by a list of the portions of the well known story that are portrayed upon it. The second circular identified the film as "A Roman Spectacle, Pictures adapted from Gen. Lew Wallace's Famous Book Ben Hur". These advertisements were circulated generally in the trade.

A "theatorium" differs from a theatre in that it lacks scenery and sometimes a stage and curtain, and charges a much smaller admission fee—5 and 10 cents. The only appurtenances required for the exhibition of the pictures are

such as are used with magic lanterns—that is, the machine itself and a white screen.

The Kalem Company does not manufacture or give exhibitions of the pictures and has no interest in them except to sell them as articles of merchandise. It had no intention of violating the complainants' rights, but, on the contrary, supposed that the exhibition of the pictures would stimulate public interest in the book and in the drama (Rec., pp. 21, 22).

Assignment of Errors (Rec., p. 36).

The first and sixteenth errors are general, the others are as follows:

"SECOND. The Court erred in that it found that Kalem Company has infringed upon any copyright of the appellees or any of them.

"THIRD. The Court erred in that it found that Kalem Company has contributed in any infringement of the appellees' copyright.

"FOURTH. The Court erred in that it found that Kalem Company has dramatized the copyrighted book of appellees, or any of them.

"FIFTH. The Court erred in that it found that Kalem Company has publicly performed or represented any dramatic composition for which a copyright has been obtained by the appellees, or any of them.

"SIXTH. The Court erred in that it found that Kalem Company has contributed toward publicly performing or representing any dramatic composition for which a copyright has been obtained by the appellees, or any of them.

"SEVENTH. The Court erred in that it held the taking of a series of photographs to constitute an infringement upon the copyright to the book or drama 'Ben Hur.'

"EIGHTH. The Court erred in that it held the sale of a series of photographs to constitute an infringement upon the copyright to the book or drama 'Ben Hur.'

"NINTH. The Court erred in that it did not hold that the making of the series of photographs by the appellant does not constitute an infringement upon the copyright to the book or drama 'Ben Hur.'

"TENTH. The Court erred in that it did not hold that the making of copies of the series of photographs by the appellant does not constitute an infringement upon the copyright to the book or drama 'Ben Hur.'

"ELEVENTH. The Court erred in that it did not hold that

the sale of the series of photographs by the appellant does not constitute an infringement upon the copyright to the book or drama 'Ben Hur.'

"TWELFTH. The Court erred in that it did not hold that the use of the copies of the series of photographs made by the appellant in and as a part of a machine or apparatus does not constitute an infringement upon the copyright to the book or drama 'Ben Hur.'

"THIRTEENTH. The Court erred in that it did not hold as a matter of law that copyright of an illustrated book or drama does not protect the proprietor thereof against the making or exhibition of pictures of scenes described in such book or drama.

"FOURTEENTH. The Court erred in that it did not hold as a matter of law that the Constitution of the United States does not include as a part of the writings of an author, when copyrighted, the exclusive right of public performance or representation of a dramatic version thereof.

"FIFTEENTH. The Court erred in that it did not hold as a matter of law that the Constitution of the United States does not include as a part of the writings of an author, when copyrighted, the sole or exclusive right to make or exhibit pictures of the unillustrated scenes described therein."

The errors assigned are intended to bring before this Court for determination the following propositions :

1. That the *making and publication* of a picture or series of pictures of the incidents described in a book, is not an infringement of a copyright in the book.

2. That the *exhibition* of such pictures, arranged upon a film that for the time of exhibition is a part of a machine, is not an infringement upon the book-copyright.

3. That such an *exhibition is not a dramatic representation* or production, and hence is not an infringement of any dramatic rights.

4. That if the public exhibition of the films, for pay, be held to be an infringement of complainants' copyright, *defendant is not an infringer, because it has not participated* directly or indirectly *in the public exhibition.*

5. That if the Statute be construed so as to include making or publicly exhibiting these pictures as an infringement, it is unconstitutional and void.

These propositions we will discuss in the order given.

The Opinion of the Court of Appeals.

The Court of Appeals held (Rec., p. 32), that the series of photographs was not an infringement upon the copyrighted book, and that it should not, as a photograph, be enjoined; thus far holding with us. It decided, however, that the *exhibition* of the pictures by a projecting machine was a *drama* under the authority of *Daly vs. Palmer*, 6 Blatch., 256, and *Daly vs. Webster*, 56 Fed. Rep., 483; that such drama infringed the reserved dramatic rights of the complainants in the copyrighted book; and that the defendant was a contributory infringer, because it "advertises the films as capable of producing a moving picture spectacle of Ben Hur and sends its advertisements to proprietors of theatoriums with the expectation and hope that they will use them for public exhibitions, charging an entrance fee" (Rec., p. 33, bottom). Finally it held that the Statute as construed by it to cover the defendant's doings, is constitutional.

So the decision below passed upon the same propositions that are presented here.

I.

The Making and Publication of a Series of Pictures of the Incidents described in a book, is not an infringement of a Copyright in the Book.

The Court of Appeals (Rec., p. 32) was undoubtedly right in affirming this proposition.

It is thoroughly established, by repeated decisions of this and inferior Courts, that copyright does not monopolize the intellectual conception, but only the form of expression, *i. e.*, the "*arrangement of words*"[1] (*Holmes vs. Hurst*, 174 U. S., p. 86), adopted by the author. In the constitutional phrase,

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[1] The use of *italics*, in quotations, is ours, unless otherwise stated.

it is the *writings* of the author, that are protected, and the Statute cannot extend the monopoly to his *ideas.*

Holmes vs. Hurst, 174 U. S., 82.
White-Smith vs. Apollo, 209 U. S., 17.
Stowe vs. Thomas, 2 Wall J., 547; 23 Fed. Cases, 201, 206, GRIER, Cir. Justice.
Baker vs. Selden, 101 U. S., 99.
Johnson vs. Donaldson, 3 Fed. Rep., 22.
Perris vs. Hexamer, 99 U. S., 674, 676.
Bobbs-Merrill Co. vs. Straus, 210 U. S., 339, 347.

The application of this rule to the proposition under discussion becomes clear from the following considerations:

A moving picture film, whether made by a modern rapid-fire camera, or by the ancient and laborious process of taking, or drawing, and collating pictures of objects in successive positions, is *a* picture.

Edison vs. Lubin, 58 C. A., 604; 122 Fed. Rep., 240.
Am. Mutoscope Co. vs. Edison, 137 Fed. Rep., 262.
United States vs. Berst, 175 Fed. Rep., 121.

The Courts have had occasion to investigate the history of this art, and have found that old and new ways of producing the pictures did not show different results in the respect stated.

Edison vs. Mutoscope Co., 52 C. C. A., 546; 114 Fed. Rep., 926.

Such pictures, in their entirety, cannot be examined or comprehended except when moved in and forming a part of a machine or apparatus whereby they are either projected upon a screen or passed with sufficient rapidity across a sight-opening or peep-hole; or else when the successive pictures into which the strip has first been cut are mounted like leaves in a book, and manipulated so as to be arrested, each momentarily, at the focus of vision and displaced rapidly by its successor (Rec., p. 32, fol. 96).

It was said in *Edison Co. vs. Lubin*, 58 C. C. A., 604; 122 Fed. Rep., 240, wherein a copyright on this sort of a film was sustained as covering *a* photograph:

"The instantaneous and continuous operation of the camera is such that the difference between successive pictures is not

distinguishable by the eye, and is so slight that the casual observer will take a very considerable number of successive pictures of the series, and say they are identical. It is only when pictures far removed from each other in the series are compared that differences are seen, but in every one the platform from which the christening took place, and on which prominent persons attending the launch stood, is depicted. To require each of numerous undistinguishable pictures to be individually copyrighted, as suggested by the court, would, in effect, be to require copyright of many pictures to protect a single one."

But whether the series be considered as an agglomeration of separate units, each a picture complete in itself, or as collectively forming a single perfect and complete picture, their making and publication cannot constitute an infringement upon a copyright that covers the text of the book.

This seems almost axiomatic, and so self-evident as not to require any extended discussion. The theory of copyright and of the statutes which define it, is to protect, not the ideas created by the author, but the form of expression which he has adopted to convey them.

The constitutional phrase, upon which the copyright statutes are based, gave Congress the power to secure for limited times "to authors * * * the exclusive right to their * * * *writings*." The contrast with the protection to inventors, who were to be endowed with the exclusive right "to their *discoveries*," is significant; in the latter case protection may be as broad as the inventive idea; in the former, its form of expression is all that is monopolized.

In the leading British treatise on Copyrights it is said of the United States law:

"Herein copyright law differs from the law of patents; in the former there may be two concurrent copyrights in what is identically the same creation, in the latter there can only be one patent, the first inventor being entitled."

MacGillivray on Copyrights, page 43.

The distinction upon which we rely is well illustrated in the case of *Baker vs. Selden*, 101 U. S., 99. There was involved a copyright on a book entitled "Selden's Condensed Ledger, or Book-keeping Simplified"; the defendant did not copy the book, but made and used account-books arranged on

substantially the same system. The Court, speaking through Mr. Justice BRADLEY, said (p. 102):

"*But there is a clear distinction between the book, as such, and the art which it is intended to illustrate.* The mere statement of the proposition is so evident, that it requires hardly any argument to support it. The same distinction may be predicated of every other art as well as that of book-keeping. A treatise on the composition and use of medicines, be they old or new; on the construction and use of ploughs, or watches, or churns; or on the mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective—would be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described therein. The copyright of the book, if not pirated from other works, would be valid without regard to the novelty, or want of novelty, of its subject-matter. The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright. The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government.

"The difference between the two things, letters-patent and copyright, may be illustrated by reference to the subjects just enumerated. Take the case of medicines. Certain mixtures are found to be of great value in the healing art. If the discoverer writes and publishes a book on the subject (as regular physicians generally do), he gains no exclusive right to the manufacture and sale of the medicine; he gives that to the public. If he desires to acquire such exclusive right, he must obtain a patent for the mixture as a new art, manufacture or composition of matter. He may copyright his book, if he pleases, but that only secures to him the exclusive right of printing and publishing his book. So of all other inventions or discoveries.

"The copyright of a book on perspective, no matter how many drawings and illustrations it may contain, gives no exclusive right to the modes of drawing described, though they may never have been known or used before. By *publishing the book, without getting a patent for the art, the latter is given to the public. The fact that the art described in the book by illustrations of lines and figures which are reproduced in practice in the application of the art, makes no difference. Those illustra-*

tions are the mere language employed by the author to convey his ideas more clearly. Had he used words of description instead of diagrams (which merely stand in the place of words), there could not be the slightest doubt that others, applying the art to practical use, might lawfully draw the lines and diagrams which were in the author's mind, and which he thus described by words in his book."

We are not here contending for any narrowly strained construction of the word "copy" in Section 4965, Rev. Stat.; although, as this Court has said, the act must be strictly construed and its provisions may not be extended to include privileges not intended to be conferred (*Bobbs-Merrill Co. vs. Straus*, 210 U. S., p. 346). But we do assert, with confidence, that the author's choice of expressing his ideas, whether written in word or in picture, in statue or in chart, and his copyright of the chosen form, nevertheless leaves the world free to adopt his ideas and to express them in any of the ways except that selected by the author. As was said in *Millar vs. Taylor*, 4 Burr, 2331:

"All the knowledge which can be acquired from the contents of a book is free for every man's use; if it teaches mathematics, physic, husbandry; if it teaches to write in verse or prose; if, by reading an epic poem, a man learns to make an epic poem of his own, he is at liberty. * * * The book conveys knowledge, instruction or entertainment; *but multiplying copies in print is quite a distinct thing from all the book communicates.* * * * *There is no incongruity to reserve that right and yet convey the free use of all the book teaches.*"

This great case, upholding the proposition that the Statute of Anne terminated the author's common-law rights upon his voluntary publication, has been recognized frequently by this Court, and was known to the framers of the Constitution.

Stephens vs. Cady, 14 How., 528, 530.
Lithograph Co. vs. Sarony, 111 U. S., 53, 58.
Holmes vs. Hurst, 174 U. S., 82, 86.
Wheaton vs. Peters, 8 Pet., 591, 676, and cases *passim*.

If one, by copyrighting a book, can prevent an artist from picturing the scenes described, reason cannot afford room for the orator to use, in his flights of fancy, the author's created

characters or figures of speech, for the idea is not open to appropriation or use in one case more than in the other. But it is the writing only, and not the idea, that is monopolized; the mode of expression and not the thought conveyed.

Book and Picture are Essentially Different.

In writing a book, details must necessarily be subordinated, if not omitted altogether, to avoid interference with the general plan or story. The reader is left to supply, from his general fund of information of the events and period to which the book relates, the multitude of little things left to his imagination, yet necessary to fill out the picture; or else receive an imperfect impression. But, with the photographer, every detail must be realized before the penetrating eye of the camera can be turned upon it; he must embody in real presence before it not merely every thought and expression of the written description, but every development of facial expression, dress, atmospheric effect, light and shade, that goes to distinguish an artistic from an imperfect picture, and, more than that, he must attain that tone or quality that characterizes a "good" photograph. Each reader, each artist, has a different realistic conception of the subject of the text.

In making the pictures complained of, it is admitted that the defendant procured some one to read the book and to write out such description of the selected portions as could be followed closely in action, and others were hired to follow the actions and motions prescribed in that description, and animals, accoutrements, etc., were utilized to realize before the camera the full details of the reader's conception. Thus, defendant ma[illegible] free use of all that the book teaches," which was its right. The making and development of the pictures required special apparatus and skilled employees (Rec., p. 20, §§ 7, 8). So defendant applied in its own art, and to its practical use, the knowledge, or ideas, that were in General Wallace's mind, and which his book embodied, but did not copy the book, which was the property monopolized in the author by the statute.

An interesting, and, we believe, illuminating, discussion involving the point under consideration arose in *Parton vs. Prang*, 3 Cliff., 537; 18 Fed. Cas., 1273, where the complain-

ant charged that defendant had made and published copies of his painting in defiance of the 9th section of the Copyright Act of 1831, which penalized "any person who shall print or publish *any manuscript* whatever without the consent of the author" (See Sec. 4967 of Rev. Stat.). The case turned upon the question whether a painting is a manuscript. After discussing the etymology of the two words, the Court (CLIFFORD, Circuit Justice, and LOWELL, D. J.), speaking through the former, said:

"Mere definitions, however, do not portray the difference between a manuscript and a picture as fully or as strikingly as it is seen when the two things are compared and contrasted as means of instruction, or of imparting an idea or description of the object or subject matter of the manuscript or picture. Separate description of each element of the object is required in the manuscript describing the several parts of which it is composed, the nature, material, appearance, size, color, dimensions, use, and everything essential to enable the reader to form an idea of what the object is which is embraced in the description given in the manuscript, all these must be considered and combined by the reader in order that he may be able to form an ideal picture of the object described or the subject-matter of the entire description. His ideal picture may or may not be in accordance with the object actually described in the manuscript, as the object itself is not presented to the senses of the reader. On the contrary, he is left to portray in his own mind the outlines of the object from the written description, and so to combine the same as to suggest an ideal picture of the object described.

"Whatever conclusion the reader of the manuscript may form, it is but an ideal picture, made in his own mind from the written description of the object, and necessarily calls into exercise all the creative faculties of the mind. No such operation of the mind is involved, where the picture or painting of the object is presented to the observer, as the object itself in a secondary form, 'drawn in colors,' is presented externally to the sense of sight. In the latter case, no ideal of the mind is necessary, as the thing itself is presented physically to the natural eye. Briefly stated, *the picture is the thing itself, but the manuscript is only the description of it in language, and leaves the mind of the reader to make the picture;* or, in other words, the picture presents, at a glance, all the characteristics of the object exactly as it exists, but the manuscript only enumerates and describes those characteristics one by one, imposing upon the mind of the reader the labor of aggregating the same into a whole and presenting to his perceptions an ideal of the described object. Different communities employ

diverse characters for letters and even for phrases, but it can make no difference what the characters are that are employed in describing such an object, not even if they are arbitrary signs, so long as it remains true that the manuscript is a description of the object and not the presentation of the object itself or its portrait, as the manuscript while it retains that character, is simply the registry of certain thoughts or ideas about a thing and not the exhibition of the thing itself, as in the case of a picture."

This Court, in the *Perforated Music Roll* case (209 U. S., 1, 16), applied, as one of the factors determining the issue of infringement, the test whether the defendant's productions were *copies* of the composition in the sense that would have satisfied the statutory condition (R. S., § 4956) that two copies be delivered to the Librarian of Congress before publication by the author. Although they embodied, or gave effect to, every musical tone of the copyrighted composition, it was clear that they were not copies in the statutory sense.

Plainly, the defendant's photographs are not copies of the book in that sense; and equally so in what the Court called "the common understanding" of *copy, i. e.*, "a reproduction or duplication of a thing" (209 U. S., p. 17, top).

In the case of *Bennett vs. Carr*, 37 C. C. A., 453, 96 Fed. Rep., 213, the Circuit Court of Appeals for the Second Circuit held that a *photograph* of a painting is not a *description* of it, to make compliance with Section 4956 requiring the deposit of a description with the Librarian of Congress.

The statutory monopoly to make copies does not cover the plates and other tools with which they are made and does not pass with their ownership (*Stephens vs. Cady*, 14 How., 530). Being a creature of the statute, this species of property is legally distinct from the underlying ideas upon which it is, after all, predicated, just as from the paper and metal without which it would have no commercial value.

That the copyright is thus limited to the form of expressing a sequence of ideas, seems to be fully supported by the statement of the Court in *Holmes vs. Hurst*, 174 U. S., 82, where it was said, page 86:

"The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to

ideas alone, since in the absence of means of communicating them they are of value to no one but the author. *But the right is to that arrangement of words which the author has selected to express his ideas.* Or, as Lord MANSFIELD describes it, 'an incorporeal right to print a set of intellectual ideas, or modes of thinking, communicated in a set of words or sentences, and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever' (4 Burrows, 2396). The nature of this property is perhaps best defined by Mr. Justice ERLE in *Jefferys vs. Boosey*, 4 H. L. C., 815, 867: 'The subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation.'"

A corollary of the general rule that excludes our pictures from the charge of infringement is, that a person may utilize the ideas portrayed in a copyrighted publication, provided he bestows upon his own writings such skill and labor as to produce an original result. This doctrine was thoroughly analyzed and illustrated in the opinion of Mr. Justice STORY, in *Folsom vs. Marsh*, 2 Story, 100, 115; 9 Fed. Cas., 342.

It has had frequent application in cases involving alleged infringement of directories and law digests, wherein the use of the copyrighted work for the purpose of ascertaining sources of information—*i. e.*, utilizing the ideas without copying their expression—has been held to be lawful.

Dun Co. vs. Lumbermen's Credit Ass'n., 209 U. S., 20.
Morris vs. Wright (1870), L. R., 5 Ch., 279.
West Pub. Co. vs. Lawyers' Co., 64 Fed. Rep., 360; 79 Fed. Rep., 756.
Edward Thompson Co. vs. American Co., 130 Fed. Rep., 369; 157 Fed. Rep., 1003.

The limit of application of the rule is thus stated by Mr. Justice STORY in *Folsom vs. Marsh, supra:*

"If so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient in point of law to constitute a piracy *pro tanto.*"

Not only is there no evidence here that the copyright proprietors were injured even in the slightest degree; but, on the

contrary, the defendant asserted by letter that its films would benefit the complainants (Rec., p. 22), and that they did not deny, but stood upon their naked assertion of legal right.

Our contention that the copyright on the book is not infringed by the making and publication of pictures of the characters, action and scenes described, seems to find full support in the decisions upon the relation borne by phonograph records and perforated records for automatic musical instruments to copyrighted musical compositions. The analogy of the situation presented in those cases to that at issue here, is striking and, we believe, complete. There, the author expresses his ideas in writings which employ the staff notations that constitute a universal musical language. They may be read, understood and expressed, by those having musical knowledge; and the unauthorized copying of copyrighted musical compositions is punished by the same statute that protects books from piracy. What then is a copy, and what is not? To transcribe the composition by making a record upon a phonograph blank, or by perforating a sheet of paper, requires neither creative nor artistic power, but merely the common skill of the artisan. Yet, to make such record, is not to copy the composition, as has been held in every reported case that has come to our special knowledge.

Kennedy vs. McTammany, 33 Fed. Rep., 584.
White-Smith Co. vs. Apollo Co., 77 C. C. A., 368; 147 Fed. Rep., 226.
Same vs. Same, 209 U. S., 1.
Boosey vs. Wright, 1 Ch., 122 (1900).
Stern vs. Rosey, 17 App. Dist. Col., 562.

These cases present a state of facts favoring the author much more than that at bar; for the records proceeded against contained, undoubtedly, a complete and accurate transcript of the very notations made by the composer; they constituted a plagiarism; they appealed solely to the sense of *hearing*, just as did the original composition; faithfully followed, they presented no variations upon the composer's recorded ideas, and no change from their literal expression, save such as was necessary to enable their reproduction by automatic machine instead of by voice or hand operated instrument.

In the present case, on the other hand, the author's

thoughts are transformed, by the alchemy of the artist's mind, into ideals that may be realized by the eye, and copied, not as specimens of General Wallace's composition, but as a *record of the artistic ideals produced in the mind of another.* The new result, the photograph, is itself a proper subject of copyright, and may be protected to the extent that the art applied has produced a new effect. These pictures constitute in the highest, most artistic sense, "the personal reaction of an individual upon nature" (*Bleistein vs. Donaldson*, 188 U. S., 250, top). They do not fulfill the definition of a copy—"that which will provide a substitute for the whole or a substantial part of the original book" (The Law of Copyright, MacGillivray, p. 97).

Undoubtedly the photograph is a *writing*, under the Constitution, and so comes under copyright protection (*Lithograph Co. vs. Sarony*, 111 U. S., 53), but it is the writing of him who posed and arranged the subjects, not of Wallace, even though the description of his tale started the train of thought in the photographer's mind that led to the conception and production of the definite picture. The defendant's pictures are far more an *independent writing* than were the circus posters discussed in *Bleistein vs. Donaldson, supra*, of which the Court said:

"It is obvious also that the plaintiffs' case is not affected by the fact, if it be one, that the pictures represent actual groups—visible things. They seem from the testimony to have been composed from hints or description, not from sight of a performance. But even if they had been drawn from that life, that fact would not deprive them of protection."

Under the doctrine of *Lithograph Co. vs. Sarony, supra*, and *Bleistein vs. Donaldson, supra*, it is clear that defendant's films were legally copyrightable, for they were the result of original conception, posing, and artistic skill (Rec., p. 20, § 8).

That it was not intended by the Congress that a photograph could be an infringement upon a copyrighted book or drama, is clear from the care exercised in framing the statutes to distinguish the former from both of the latter. Sections 4962, 4964, 4965 and 4966 identify the photograph as different, in respect of the manner of inscribing notice, the doings that constitute infringement, and the penalties therefor. This distinction, with

reference to notice under Section 4962, has been recognized and applied recently by this Court in *American Tobacco Co. vs. Werckmeister*, 207 U. S., 284, at page 291. Now, since the plain line of demarkation has been thus preserved by the lawmakers, is it open to the Courts to divert or overstep it by holding the picture, however used, to be a book, or a drama, simply because both are forms of writing, or because the picture is exhibited in a place of dramatic entertainment? The question carries its own answer.

See *Littleton vs. Ditson Co.*, 62 Fed. Rep., 597; 67 Fed. Rep., 905; holding that "book" is distinct from "musical composition."

Woods vs. Abbott, Fed. Cas. No. 17938, holding that "photograph" is not a "print."

Stowe vs. Thomas, 2 Wall. Jr., 547, holding that "translation" is not a "copy."

Hills vs. Austrich, 120 Fed. Rep., 862, holding that "stone" does not include "metal plate."

All the marks of literary property that distinguish the book or the drama are lacking from the picture, save in so far as both involve the same underlying ideas.

II.

That the Exhibition of the Pictures, Arranged upon a film which is, during all the time of its use, a part of a machine, is not an infringement of the book copyright.

The defendant's position, if at all affected, is strengthened by the circumstances that complainants' book as published is not illustrated, and that the *story* of the book is not told by our pictures. *Four* of its incidents, in all, are depicted; and they are those that have especially appealed to the artist's creative talent ever since the book became a part of that fund of common knowledge upon which all may draw, provided they do not copy the medium of expression. Who has read

of the procurator's wounding by the stone accidentally pushed from the house top by Ben Hur, or of the chariot race, without portraying for himself the action and passion so vividly described by Wallace? Who has not had his interest in the book aroused or revived by gazing upon paintings or engravings of these scenes? But does the exhibition of a picture, or of our films, injure the owner's copywright? We think not.

The exhibition of the picture does not lessen interest in the book, or tend to diminish its sales. On the contrary, it seems to us to constitute a desirable advertisement of the original work (Rec., p. 22), and to stimulate a desire to read the masterpiece, to discover the relation to the other parts of the incidents depicted by the artist, and to learn the story. Many of the main points that characterize the book and *make* the story, are not on the list of those illustrated by the appellant (Record, cut facing p. 12). Nothing is shown or suggested by the pictures of the life of Christ into which the tale is woven and entwined, nothing of the shipwreck, of Simonides and Esther, who figure so prominently, of the grove at Corinth, of the Arab, of the history of the hero's mother and sister, notably their wretched life as lepers and their divine cure, or of many other incidents and characters of equal dramatic interest with those taken for illustration, and which together make an absorbing story.

With the ultimate use of the pictures, the defendant has nothing to do, and it will be argued in another place that, if their exhibition in a certain way does constitute an encroachment upon complainants' copyright, this defendant is not a contributor in the sense of the law.

But we assert that *their exhibition in any manner does not infringe* complainants' rights in the book, and it seems to us that this follows necessarily from what has been said under the previous head. Aside from the specific question arising under the "dramatic performance" statutes (§§ 4952, 4966, R. S.), we can see no room even for argument to distinguish this case from those regarding the use in phonographs and automatic pianos of records made from copyrighted musical compositions (*supra*, p. 16).

In the present case, the film of photographs is a "record" in the same sense that that word was used in the *Perforated*

Music Roll case (209 U. S., 1, 9). It is intended for use in a machine, and is not used except in that manner (Rec., p. 19). *During the operation the film is and remains a part of the exhibiting machine.*

Motion is of the essence of these pictures—successive pictures of the same group of objects must be substituted for each other with such rapidity that the eye cannot detect the change from one to the next; and they must exhibit the objects in a rapid succession of changes of postures or dissected movements; so far as each picture is concerned the subjects are momentarily inert. The reproduction of motion is not secured by viewing or examining the pictures separately, but *by making them a part of the machine*, which will preserve the rapid succession and at the same time momentarily arrest each before the eye.

The complainants' creation was not copied in the making of the pictures, but they are realizations, in a different art, of some of the ideas to which Gen. Wallace gave a written portrayal. Their exhibition by machine does not approach more nearly the writing of the book than did their making and selling.

The art of moving pictures was developed separately from that of printing; it may, and in this branch does, follow upon photography, but it depends as little upon it, in the last analysis, as upon the toys, like the phantoscopes and praxinoscopes of fifty years ago, where the images were drawn in successively advancing positions and made to blend into a single, changing picture by mechanical manipulation. The art was advanced upon its own line, by a series of brilliant inventions that have been reviewed by the Courts, particularly of the Second Circuit (*Edison vs. Am. Mutoscope Co.*, 114 Fed. Rep., 926; 52 C. C. A., 546; *Armat vs. Same*, 118 Fed. Rep., 840).

The posing of individuals, the arranging of groups, the timing of movement and action, the technical skill involved in the taking, spacing and printing of the pictures, are all involved in defendant's pictures, and entitle it to protection in their creation, as against complainants' charge.

It is a fact to be considered that, although the moving picture art has been developed highly in recent years, and has reached every city in the nation, doubtless to the supposed

detriment of book-authors in many cases parallel with this one, nevertheless Congress has not seen fit to legislate for the relief of the latter, although much other copyright legislation has been passed (see 209 U. S., page 17, bottom, also Act of March 4, 1909, 35 Stat. at Large, 1086).

In a peculiar sense, the exhibition of these living picture films is a "picture writing." Undoubtedly the most rudimentary, as well as the most universally understood, form of writing is by pictures. But, unless the author has expressed his thoughts by pictures—has made his "book" by pictures—the law will not prevent others from exercising their artistic talents upon his ideas. As well might the author inveigh against the musician, claiming that every passion, sentiment, and every phase of character, of his book, had found full and clear expression in the symphony or suite, as to complain against the realistic portrayal by moving pictures of the life, action and setting that he has sought to describe.

Yet the musical expression of the composer, though directly inspired by the poem and lacking complete understanding except in connection with its text, is, nevertheless, distinct intellectually, although both seek to give expression to the self same ideas.

Be it true, as will doubtless be urged, that complete appropriation of the book may be secured without relief, by reading the words of the book upon a phonograph record and preparing a graphic accompaniment by a series of moving pictures of everything described, and simultaneously delivering the contents of the one through a talking machine and of the other through a picture projecting machine; nevertheless the law gives no remedy, and copyright in this country is wholly statutory (*Wheaton vs. Peters*, 8 Pet., 591; *Banks vs. Manchester*, 128 U. S., 244, 253). Whether a statute might be drawn to give relief, without violating the Constitution, is questionable, so far as the phonograph is concerned, and, we believe, impossible as to the pictures; but on the present condition of the law, the statement of the Court of Appeals in *White-Smith Co. vs. Apollo Co.*, 77 C. C. A., 368; 147 Fed. Rep., 227, is a complete exposition of the law as laid down by this Court in cases heretofore cited. The Court said:

"We are of the opinion that the rights sought to be protected by these suits belong to the same class as those covered

by the specific provisions of the copyright statutes, and that the reasons which led to the passage of said statutes apply with great force to the protection of rights of copyright against such an appropriation of the fruits of an author's conception as results from the acts of defendant. But in view of the fact that the law of copyright is a creature of statute, and is not declaratory of the common law, and that it confers distinct and limited rights, which did not exist at the common law, we are constrained to hold that it must be strictly construed, and that we are not at liberty to extend its provisions, either by resort to equitable considerations or to a strained interpretation of the terms of the statute.

"We are therefore of the opinion that a perforated paper roll, such as is manufactured by defendant, is not a copy of complainant's staff notation, for the following reasons: *It is not a copy in fact. It is not designed to be read or actually used in reading music as the original staff notation is; and the claim that it may be read,* which is practically disproved by the great preponderance of evidence, *even if true, would establish merely a theory or possibility of use, as distinguished from an actual use.* The argument that, because the roll is a notation or record of the music, it is therefore a copy, would apply to the disc of the phonograph or the barrel of the organ, which, it must be admitted, are not copies of the sheet music. The perforations in the rolls are not a varied form of symbols substituted for the symbols used by the author. They are mere adjuncts of a valve mechanism in a machine. In fact, the machine or musical playing device is the thing which appropriates the author's property and publishes it by producing the musical sounds, thus conveying the author's conception to the public."

In like manner spoke the Court of Appeals of the District of Columbia in the Phonograph case:

"We cannot regard the reproduction, through the agency of a phonograph, of the sounds of musical instruments playing the music composed and published by the appellants, as the copy or publication of the same within the meaning of the act."

Stern vs. Rosey, 17 App. D. C., 562.

This was cited with approval by the Supreme Court in the Perforated Music Roll case.

White-Smith Co. vs. Apollo Co., 209 U. S., 1, 12.

It is true that the pictures are capable of being examined apart from the machine; but they are not intended for that

purpose, and if so used are not different from any other pictures. Scarcely with infinite time and patience could the thousand feet of film (Rec., cut facing page 12), with its 10,000 or more of pictures be examined by the human eye and comprehended by the mind. But this is merely "a theory or possibility of use, as distinguished from an actual use." It is the machine that enables them to be read and understood.

Facts similar to these, coupled with the inaction of Congress to extend the statute to cover this sort of appropriation of ideas during its long continuance, were considerations that moved the Courts in the cases just cited, to hold that it was not the intention of the lawmakers that authors should have such protection.

III.

Such Exhibition of the Pictures is not a "Public Performance or Representation" in Violation of the Dramatic Copyright Act.

The Court below overruled this contention, says (Rec., p. 32, bottom):

"When the film is put on an exhibiting machine *which reproduces* the action of the actors and animals we think *it does become a dramatization and infringes the exclusive right of the owner of the copyrighted book to dramatize it as well as his right as owner of the copyrighted drama* and of Klaw and Erlanger's right as owners of the performing right publicly to produce it. In other words, *the artist's idea of describing by action the story the author has written in words is a dramatization.*"

This declaration the Court supported upon the authority of *Daly vs. Palmer*, 6 Blatch., 256, and *Daly vs. Webster*, 56 Fed. Rep., 483.

The elements of this finding are (*a*) that the film of pictures *and the machine* which projects them *constitute a drama*; (*b*) that such drama infringes the reserved right of the author of the book to dramatize (R. S., Sec. 4952); (*c*) that such drama

infringes the complainants' drama that was produced and copyrighted after the book (Rec., p. 5, fol. 7, of bill of complaint). As to *c*, the Court was plainly wrong, for there is nothing in the admitted facts and nothing in the record except the unsupported allegation of the bill (Rec., p. 6, bottom), to show *any* correspondence between the film and the drama produced by complainants and alleged to be founded upon the book. The defendants have no knowledge of the drama (p. 20, § 8).

As to elements *a* and *b*, it is plain that they are founded upon the further statement of the Court that "the artist's *idea* of describing by *action* the story the author has *written is a dramatization.*" But the true test is not that, but *whether the public exhibition of the pictures constitutes a drama.*

It is true that the photographic film is often projected, by the proper machine, upon a screen in a theatre. More often this is done in a "theatorium," which is agreed to be a "place of amusement, to which an admission fee of five or ten cents is charged, but differing from a theatre in that while many have a stage and curtain, all lack scenery" (Rec., p. 19, middle). We shall not argue that there is any material difference, in respect of the issues presented, between theatre and theatorium; but it is clear that, wherever displayed, neither stage, scenery nor curtain is an adjunct of the exhibition, for the pictures are "thrown or projected upon a white screen, after the manner of magic lantern pictures" (p. 19, bottom), and obviously require nothing but an auditorium to hold the spectators and a screen in the sight of all, besides the machine and a source of light to make its operations effective.

These things are not important for any narrow or technical reason. If the performance were dramatic in any legal sense, it would be questionable whether the absence of the stage, curtain and scenery is material. But the nature of the act complained of is such that it lacks all attributes of the drama, save such as are common to every exhibition or entertainment to which an admission fee is charged.

Complainants lay much stress upon the fact that the statute forbids "any person publicly *performing or representing* any dramatic or musical composition" (Sec. 4966). We are not aware of anything in the history of the section as it now reads that would justify the conclusion that the words "per-

forming or representing" are used otherwise than as alternatives. But complainants assert that while there may be no public *performance* of its drama, there might still be a "public representation"—of what? Not of the drama, for the performance and the representation of that are concededly one and the same. But, they say, we took pictures of a performance, and, by exhibiting the pictures, we *effect a representation of the actual performance.* That is, it is a representation of a public performance of a drama, that is charged to be a violation of the statute. We submit that the facts do not support this charge; for no one viewing the pictures as exhibited would believe that it was a drama or stage representation that was being portrayed; but would see the pictures only and, unable to detect their rapid substitution, would be illusionized by the persistence of their common features upon his retina. It would not be a representation of a dramatic performance, but the illusion of *an actual occurrence.* The defendant's purpose was, to *avoid* the studied and mechanical effects of the drama (Rec., p. 21, § 11).

However cunningly our adversaries' argument may be advanced, the foregoing is the actual substance of it. It is obvious that the statute does not cover the act of which complaint is made. If it did, no one could publish a series of photographs, or even a single picture, of a dramatic situation, without *representing* the performance.

The Court of Appeals, in order to find infringement of the supposed dramatic rights, was forced to the position that the "*idea* of describing by action the story the author has written" is an infringement; but that is in substance and effect a finding that *the appropriation of ideas* is the final test of infringement in copyright cases; and that as we have seen above has been distinctly negatived by this Court (*supra*, p. 8).

The major premise advanced by the Court of Appeals, as a basis for its conclusion that the pictures when projected by an exhibiting machine, is therefore unsound. It is, however, pertinent to inquire whether there is any other justification for that conclusion. We deny it, upon the following grounds:

If complainants are to succeed at all, it must be because the exhibition of the pictures constitutes a dramatic perform-

ance; or, to put it perhaps more liberally for them, that the pictures *during exhibition* constitute a dramatic composition, and *the act of exhibition* is a public representation. The distinction seems to us to be immaterial, for in either case there must be a *dramatic* representation or performance.

We are confident that the exhibition of our pictures in that one of the several ways (Rec., p. 19, § 4) chosen by complainants to support their charge of infringement, lacks all the attributes distinguishing a dramatic representation from any other public exhibition.

If complainants' argument is correct, there can be a dramatic performance or representation without stage, scenery, curtain, without a theatre itself and *without actors*, the machine and the white screen upon which its light is focussed becoming a substitute for all.

The argument seems to lack substance. There is no *human element* involved in its representation or performance, if the exhibition of our pictures be so termed. Never before that we can find has an exhibition been declared to be a dramatic performance or representation unless human actors are present, and either performing themselves or at least causing dummies or puppets to move and act.

Drone on Copyrights, pp. 587-589.
Russell vs. Smith, 12 Q. B., 236, 237.

A recent text book (Brackett on Theatrical Law) says (p. 54):

"*The question of the dramatic portrayal which is the basis of a dramatic performance depends entirely on the personal theme or element as therein represented*, which theme must be carried out by action portraying or representing some phase of human life. This does not depend on spoken words, for it may be uttered and portrayed by pantomine or even by marionettes if accompanied by dialogue, carried on by unseen but living persons"—citing, among other cases,

Lee vs. Simpson, 3 C. B., 871.
Day vs. Simpson, 18 C. B. (N. S.), 680.

Manifestly, in the foregoing statement, the personal element—that is, the necessity of personal intervention in the performance—is in the author's mind as a necessity. But he

does not leave his opinion to conjecture, for it is said on page 60:

> The person who speaks or controls need not be visible, as in the performance of marionettes, nor need he utter words when in view, as a clown in a pantomine, for the voice explaining the action and gestures of the marionette and the mind working through the pantomine art of the clown, both illustrate some feature of life with its story of human interest." * * * (p. 61): "*As we have seen, only such matters as include a performer or human dialogue and portray emotion can be classed as dramatic performances;* a more liberal rule has been laid down as to what may be protected as a dramatic composition under the copyright law."

But it does not help complainant to plead that we have a dramatic composition.

Webster defines a dramatic composition as "a poem or composition representing a picture of human life and accommodated to action." This definition necessarily excludes the machine and its pictures which complainants seek to hold. This is true whether the film and the machine for operating it, including the screen upon which the pictures are exhibited, be considered together, or the picture-film be regarded by itself. Neither the whole device nor the changeable element that temporarily constitutes a part of it, is a dramatic composition; but, however analyzed, the end is, as was the beginning, a picture.

However cunningly the argument of our adversaries be constructed, it comes back to this: That the *use* of the pictures as a part of an exhibiting machine makes them a copy of the book, although they in themselves are *not* such copy.

The Court of Appeals, as we have seen, rested its judgment upon the *Daly* cases, in determining the exhibition of the films to be both a drama and a dramatic representation (Rec., p. 33). The first of these authorities was *Daly vs. Palmer* (6 Blatch., 266; 6 Fed. Cases, 1132).

This was a suit in equity for the infringement of a *copyrighted drama*, "Under the Gaslight." One feature presented the placing or tying of one of the characters upon a railroad track, and his rescue at the moment of extreme danger from a

locomotive bearing down upon him. Defendant adopted this feature in its drama, but varied the circumstances and the accompanying dialogue. The Court (Judge—subsequently Mr. Justice—BLATCHFORD) held infringement of the copyright, and enjoined it. The same litigation reached the Circuit Court of Appeals for the Second Circuit (*Daly vs. Webster*, 56 Fed. Rep., 483) which followed Judge BLATCHFORD, and twice appeared in this Court (*Webster vs. Daly*, 163 U. S., 155; *Brady vs. Daly*, 175 U. S., 148). This Court, however, was not called upon to decide the main question involved, as the first named appeal went off on a point of practice, and in the second the Court expressly said (175 U. S., 159):

"The question as an original one of how far a copyright of a play protects any particular scene therein from being publicly produced or represented by another, aside from the dialogue contained in the play, is not before us."

So far as counsel are aware, this Court has never decided that question. In the *Perforated Music Roll* case, again the Court stated that the question of performing rights was not before it (209 U. S., p. 16).

The decisions of Judge BLATCHFORD and of the Court of Appeals, however, were accepted and adopted as controlling in the present case, as appears from the opinion now appealed from (Rec., p. 32, bottom, 33).

But, were we to accept the rule of *Daly vs. Palmer* without challenge, we would nevertheless contend, with confidence, that it lacks control save upon its own or analogous facts; that the facts here are in no legal sense analogous; and that, so far as effort has been made to extend Judge BLATCHFORD'S rule, it has failed, except in the Court below. The basis of this position is as follows:

FIRST. In the *Daly* cases, the complainant relied upon a *dramatic* copyright, the chief feature of which was the incident of the railway track, which was new in a copyright sense; and the defendant's appropriation was in a drama. In the present case, on the other hand, no correspondence whatever is shown between complainant's *drama* and our film; true, it is averred in the bill that the defendant has made "a substantial reproduction of the scenes, incidents and characters of the Book 'Ben Bur' *and of the dramatization of the said*

book" (Rec., p. 6, fol. 8; p. 8, top); but that is a generalization, and is not supported by the agreed statement of facts, which shows a partial utilization of ideas contained in the *book*, only, and does not identify our pictures in any way with the drama (Vid. Rec., p. 20, § 8). The proofs do not in any way explain the contents of the drama, or attempt to compare our pictures with it.

SECOND. A general rule was invoked by Judge BLATCHFORD that the appropriation of the idea underlying the copyrighted drama, in another drama, would constitute the latter an infringement and in support of that, he drew an analogy from an English decision upon a musical copyright, wherein it was held that any use of the air embodied in a copyrighted musical composition would infringe the copyright. But Judge BLATCHFORD'S decision on this point was specifically advanced in support of the appellant's argument before this Court in *White-Smith Co. vs. Apollo Co.* (*vid.*, 209 U. S., p. 4); and its adoption was essential to complainant's case then; for it was admitted that defendant had adopted *every musical note* of complainants' copyrighted composition, although denied that its perforated music roll was a *copy* of the printed, copyrighted writing or composition. But this Court distinctly rejected the theory and defined a copy as "a written or printed record of it" [the original] "in intelligible notation" (209 U. S., p. 17).

THIRD. But Judge BLATCHFORD'S specific rule—that a dramatic composition may be infringed by the adoption of the scene or dramatic incident even though the accompanying written dialogue be discarded or replaced—has been judicially investigated and discarded in the recent English cases of *Scholz vs. Amasis* (Eng. Law Times issue of May 19, 1909), and *Tate vs. Fullbrook* (38 L. T. Rep., 397; 3 App. Cas., 483), wherein it has been held that similarities in the plots and scenic similarities *are only material upon the question of the way the copy is taken, and that, in the absence of copying the dialogue, those elements do not constitute infringement.*

The case of *Tate vs. Fullbrook*, cited above (see also 1 K. B., 821, 1908) decided by the ~~German~~ Court of Appeal, was appealed from a decision cited and much relied upon by our adversaries in the lower courts as being in direct support of

their contention. But the English Court of Appeals discarded the theory of the Court below and reversed its judgment. The case involved the specific question whether, under the British Copyright Acts of 1833 and 1842 (from which our own Dramatic Act was drawn) the plagiarism of the scenic effects and "situations" from the copyrighted drama, *wilhout the adoption of the dialogue*, amounted to infringement. All the judges concurred in reversing the judgment which had been in plaintiff's favor, rejecting the broad doctrine of *Chatterton vs. Cave*, L. R., 10 C. P. 572 : 33 L. T., 255.

Lord Justice WILLIAMS said (p. 830) :

"But as I have said, my view of the true construction of the Act is that the subject-matter, the right of the author in which is intended to be thereby protected, is something which is capable of being printed and published. I do not know that I need go through the similarities and dissimilarities of the two sketches in question. So far as the words of the two are concerned, it is not denied that the similarities are of the most trifling description * * * The similarities principally relied upon by the plaintiff's counsel are in respect of matters which in my opinion are no part of the plaintiff's dramatic production. *All that we have here is a certain similarity of stage situations and scenic effects, which ought not, in my opinion, to be taken into consideration at all in a case where there is no appreciable similarity between the words of the two productions.*"

See also opinion House of Lords in *Hanfstaengel vs. Baines*, 1895 Ap. Cas., 20.

The rule of these English cases is not only equally applicable to the letter and spirit of our statutes, but is in perfect consonance with the constitutional limitation in the United States (*i. e.*, of limiting the monopoly to form of expression). For the only monopoly permitted to authors in this country is to their "*writings*;" the author may write his ideas in any of the known ways of recording them, by picture, by words, by maps, by written musical notation, by (we suppose) perforated holes in a strip of paper; or he may record his ideas in all of these ways and, as so recorded, copyright each. But, *once he publishes, the ideas* so written *are free to the world*, and any one may write them in any way other than that or those made the subject of the copyright. This

construction is entirely favorable to the author; he may write in any form he chooses and in as many forms as he chooses, and his writings are protected if he follows the statutory procedure for copyrighting each of them. But, if the law is stretched to prevent another from adopting *his* own way of expressing the ideas, the law monopolizes the *ideas*, and not merely the *writings*, and so is unconstitutional.

To our mind, no clearer case could be presented than the present one, for the Court below was forced to admit that defendant's photographic films were not a copy of the book, and it so held (Rec., p. 32, fol. 55). But, finding that the exhibition of the films portrayed the ideas contained in the book, it held the films to infringe the right to dramatize the book (*i. e.*, the right to utilize the ideas in some way not written in the book by the author) and hence extended his monopoly to embrace something he had not written. That was tantamount to construing "writings" of the constitution as though it said "ideas"—*i. e.*, enlarging it even beyond "discoveries" of inventors, of the same constitutional clause.

FOURTH. The main reliance of our adversaries has been placed upon the *Daly* cases because of the supposed application of the definition of a dramatic composition, as stated by Judge BLATCHFORD, to the exhibition of defendant's film. The statement was as follows (6 Blatchf., 256; 6 Fed. Cases, 1132, 1135, bottom).

"A composition * * * is a written or literary work invented and set in order. *A dramatic composition is such a work in which the narrative is not related, but is represented by dialogue and action.* When a dramatic composition is represented, in dialogue and action, by persons who represent it as real, by performing or going through the various parts or characters assigned to them severally, the composition is acted, performed or represented; and if the representation is in public, it is a public representation. *To act, in the sense of the statute, is to represent as real*, by countenance, voice, or gesture, that which is not real. A character in a play who goes through with a series of events on the stage without speaking—if such be his part in the play—is none the less an actor in it than one who in addition to motions and gestures, uses his voice. A pantomime is a species of theatrical entertainment in which the whole action is represented by gesticulation without the use of words."

It was upon this passage that the Court below rested its opinion, and we have italicized the parts similarly emphasized in our opponent's brief below. But the rule must be understood in connection with the facts, to which it was applied, and not followed upon a state of facts radically dissimilar. In the Daly cases, both parties had, unquestionably, *dramatic compositions;* and had publicly performed them. The issue was whether defendants' adoption from the copyrighted play and use of a series of dramatic situations comprising the "railroad scene" infringed the copyright notwithstanding material variations in the accompanying dialogue. In order to establish infringement the Courts in the Daly cases *extended* the statute beyond, we believe, any constitutional warrant. But accepting it for the purpose of the argument, the rule does not cover our case, but the statute must again be wrenched from its anchorage in order to fit it to the present case.

For our films or pictures lack every element of a dramatic composition; and their exhibition in public places to which admission is charged, lacks every element of a drama. The films do not constitute "a composition"; they are pictures, not books; they are not *dramatic* compositions, for they lack dialogue, stage directions, "business", entrance and exit of actors; they are intended to be seen, *i. e.*, viewed, when projected by the machine, not to be *performed* or *represented*. Their *exhibition*, even in theatres, is equally outside Judge BLATCHFORD'S rule, because there is no performance, no acting, no representation by countenance, voice, or gesture. There is no human intervention in the exhibition at all. None of the accessories of a theatre is necessary or desirable; scenery and curtain are not only dispensable, but objectionable. A white screen, which would be a serious obstacle to the success of a dramatic performance, is a *sine qua non* to their exhibition. A stage is not necessary (Rec., p. 19, § 4).

FIFTH. Our adversaries, further relying on the Daly cases complain that, by *indirection* we accomplish the same result as a dramatic performance. This means that, owing to a series of brilliant inventions in the *moving picture* art, it is possible to project upon a screen a series of pictures in such

rapid succession that the eye fails to detect the changes of pictures and consequently, by the "illusion of motion", the pictures are viewed as *one* that is constantly changing in persons, objects and background. The application of this highly developed and specialized art to some of the ideas embodied in complainants' book, is the act of which complaint is made. But, in the case of *White-Smith vs. Apollo* (209 U. S., 1) this Court resisted a like plea, saying (209 U. S,. p. 18):

"It may be true that the use of these perforated rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. But such considerations properly address themselves to the legislature and not to the judicial branch of the Government. As the act of Congress now stands we believe it does not include these records as copies or publications of the copyrighted music involved in these cases."

The rule that applied to a case where the appropriation was within the same art—music—and of every note of the composition and in the precise order written, seems to extend to this case, wherein the adaptation of ideas was but partial, and from one art—the written word—to the pictorial or photographic art.

Much stress was laid in argument in the Court below upon the supposed analogy of the present state of facts to that in the Irish case of *Turner vs. Robinson*, 10 Irish Chancery Reports, 121 and 510. But it seems to us that the citation is inapt, for the reason that the Court there was not dealing at all with a dramatic composition, but with a copyrighted *picture*. The complainants' asserted rights in *Turner vs. Robinson* were in a picture representing the death of Chatterton. The *infringer created a picture* by painting a rough background similar to that in the original painting and by posing living models before it; then, by means of a camera, a photograph was made, and the sale of stereoscopic views or slides made from it was held to be an infringement of the painter's right. The case therefore started with the copyright of a picture and ended with an infringing copy of it; not made directly from the original, as we have seen, but nevertheless a copy.

We submit that these and like cases have no application to

the present state of facts, although it appears that the prevailing opinion of the English Courts has been contrary to that declared in the case last cited (see *Hanfstaengel vs. Baines*, 1895 Ap. Cas., 20). Perhaps an analogue to the case at bar is found in the English case of *Hanfstaengel vs. Empire Palace* (1894), 2 Ch. Div., 1, and (1894) 3 Ch. Div., page 109, in which it was contended that the copyright upon a picture was infringed by " the grouping of people on the stage so as to form *tableaux vivants*." But the Court held that there was no infringement. It seems to us that we can justly claim that the logic of that decision applies to the facts here ; that is to say, if a drama or dramatic entertainment is not an infringement upon a copyrighted picture, a picture cannot be held to infringe a drama.

The question reserved by the Supreme Court in the *Perforated Music Roll* case—209 U. S., 1—of the " public performance " of the copyrighted music by the operation of the machines and the perforated rolls, presents no difficulty so far as this case is concerned. It is probable that counsel designedly refrained from presenting the question in the music roll case, for the reason that, had the complainant prevailed upon it, it would have been of little avail, since most of those instruments are used in private houses, and the commercial value of restraining *public* performances of them would have been relatively trifling. In the present case, however, the complainant's action seems to be confined now to the *public* exhibition of our pictures, although the statement of facts make it plain that they are privately used and exhibited on several kinds of machines (Rec., p. 32, fol. 96). Whatever the merit of the contention that the operation of an automatic piano upon a perforated music roll, in public, constituted a performance of the *musical composition*, the language of the statute that applies to a *dramatic representation* plainly excludes the statement of facts here before the Court ; for, as we have argued, the defendant's film of pictures is not a " dramatic composition," and its exhibition has none of the attributes of the drama, save that it is a spectacle that attracts patronage at an admission fee. But that is true of a circus, of an exhibition of legerdemain, of a dance in costume accompanied by a series of poses, or of a purely me-

chanical arrangement simulating a river, into which a person falls from a bridge. All of these cases the Courts have distinguished from dramatic performances.

Harris vs. Commonwealth, 81 Va., 240.
Jacko vs. The State, 22 Alabama, 73.
Fuller vs. Bemis, 50 Fed. Rep., 926.
Carte vs. Duff, 23 Blatch., 347; 25 Fed. Rep., 183.
Serrana vs. Jefferson, 33 Fed. Rep., 347.

Were the question less clear than it is, upon the facts, we would rely with confidence upon the repeated decisions of this Court, that the copyright statutes are to be construed strictly, and not stretched by resort to equitable considerations.

Banks vs. Manchester, 128 U. S., 244.
Bolles vs. Outing Co., 175 U. S., 262, 268.
Higgins vs. Keuffel, 140 U. S., 428.
Thompson vs. Hubbard, 131 U. S., 123.
See, generally, *Oregon Ry. vs. Oregonian Co.*, 130 U. S., 1, 26.

We submit that the exhibitions complained of are not dramatic representations or productions, and hence not an infringement of any dramatic rights.

IV.

In any event, Defendant is not an Infringer, Direct or Contributory.

If we are sound in our proposition that the pictures do not infringe the book copyright, but nevertheless the Court should hold that their exhibition in theatres and theatoriums is prohibited by section 4966, R. S., with reference to dramatic rights, it remains to consider whether the defendant is an infringer, direct or contributory.

The stipulated facts are that the films it makes are sold by it "as articles of commerce particularly to jobbers" (Rec., p. 20, top); that they are in common use not only for the exhibitions complained of, but on projecting machines used in

schools and on special types made for use in homes; also in machines where they are to be seen by one person at a time, through a sight opening or peep-hole; and that the films are cut up and the successive pictures pasted on the leaves of a thumb-book, which, by suitable manipulation, may be made to cause the illusion of motion (Rec., p. 19, fol. 33). In pursuance of defendant's natural desire to sell as many as possible of its films, it issued advertisements which are exhibited in the record, just after page 12, the first of which refers to the length of the *film*, terms it the most superb *moving picture* spectacle ever produced in America and the best executed American *film* ever presented. The second advertisement says: "A Roman spectacle, *pictures adapted* from Gen. Lew Wallace's famous book Ben-Hur. Watch for it! Get it first!" Both advertisements contained illustrations of a four horse chariot and of a part of a race course. These advertisements "were sent by the Kalem Company to *many hundreds interested in the moving picture business, including* managers or proprietors of theatres and theatoriums throughout the United States" (Rec., p. 20, bottom). It is further stipulated that the Kalem Company sold and disposed of the films in the ordinary course of business, the vendees acquiring ownership of the films as articles of commerce and for such uses as they should desire (p. 20, near bottom).

The Kalem Company does not manage or give representations in any theatres or theatoriums (p. 19, bottom). The Kalem Company expected that the films, or some of them, would be put to the various uses to which moving pictures can be put, including the particular use complained of (p. 20). Defendant acted innocently, under legal advice, and in the belief that the pictures, far from injuring the complainants' rights, would constitute a most desirable advertisement of the complainants' dramatic production (p. 23).

In all of defendant's acts the films have been dealt with as vendible articles of commerce, and in a natural and straightforward manner, appeal being made to *users of films* to purchase these, without any suggestion that they might be used as a substitute for the book or drama that are complainants' property, and without any indication of a desire to appropriate or trade upon complainants' legal rights.

The Court below held defendant to be guilty of *contributory infringement* because of its advertisements sent to users, and because of the "expectation *and hope*" that they would be used in exhibitions in theatres charging an admission fee (Rec., p. 33, bottom). But that is both illogical and contrary to the statute. *Illogical*, because the Court had already defined the infringement to be by *dramatizing*, caused by putting the pictures on an exhibiting machine; "*expectation and hope*" are not relevant if the critical act was the use on a certain kind of machine and in a certain sort of place. The fact is that defendant has nothing to do with the machines, the theatres, the exhibitions, or in any manner with the use to which the films are put.

The Court's finding is *contrary to the statute* because, as an act of infringement, dramatizing is entirely distinct from public performance or representation. *Dramatizing* as an act of infringement is defined by R. S., Sec. 4965 and is punishable by forfeiture of the plates on which the drama is copied, and of *one* dollar for each sheet found in the offender's possession. This, being a statute of condemnation, is strictly construed, and every element must be present in order to justify its application.

Thornton vs. Schreiber, 124 U. S., 612.
Bolles vs. Outing Co., 175 U. S., 262.

On the other hand, Section 4966 provides *damages* against public performance of a dramatic composition, of $100 for the first performance and $50 for each subsequent one, (see *Brady vs. Daly*, 175 U. S., 148). These are the only statutes, and the acts fastened upon the defendant do not comply with either, for nothing is shown to have been "found in its possession" (Sec. 4965), and, as to Sec. 4966, even the Court below found that the acts of infringement amounted to *dramatizing* only, the critical point being "putting the film on the exhibiting machine" (Rec., p. 32, bottom), which defendant has not done.

Defendant derives no profit from the exhibition, and hence is not *within the class* against which Sec. 4966 is directed, for that operates against the actual wrong doer—the one who manages, *i. e.*, "gives" the performance (*Brady vs. Daly*, 175 U. S., p. 174)—not the indirect participant therein.

The distinction between the subjects matter of the two sections of the statute is sharp, and their respective definitions are equally sharp, and the proven facts do not fulfill the requirements of either.

The defendant is not concerned with the ultimate use to which its films are put, and they are manifestly susceptible of many uses which complainants do not contend to be within the purview of a dramatic copyright. The very emphasis laid by our adversaries upon the presence of the theatrical assessories in the places where some of the films have been used, is a most significant suggestion that no complaint could be made of our products save when found in what our adversaries say is bad company. But the accompaniments of stage, scenery and curtain are not only entirely beyond defendant's control, but they have no relation whatsoever to the exhibition. Their presence is of no greater import than is the presence of beds, operating table and instruments in a hospital, when the pictures are exhibited there.

The decisions, so far as relevant, seem to support this view. In *Russell vs. Briant*, 8 C. B., 836, 848, it appeared that the defendant let the room or hall for a performance, and attended to the putting up of bills and the selling of tickets in his place; but it was said that these facts "afforded no evidence that the defendant represented, or caused to be represented, the musical composition in question within the meaning of the statute." It was further stated to be the rule that defendant is not liable unless, either personally or by agent, he actually takes part in a representation which is a violation of the copyright.

In the case of *Harper vs. Shoppell*, 26 Fed. Rep., 519, which was decided by his Honor Judge WALLACE in 1886, it appeared that a copyrighted number of "Harper's Weekly" contained an illustration, a cut of which had been made by defendant and a copy of the cut sold. The Court said (p. 521) (Italics ours):

"Assuming that the publishing of a single poem or article or illustration from the copyrighted newspaper may be piracy, the defendant has not done this. The reproduction of the cut and the sale of the stereotype plate, without more, treating those acts as using an extract from the plaintiffs' newspaper, could not injure the plaintiffs, or interfere to any appreciable extent with the profits they could derive from the sale of their

copyrighted publication. *The cut was capable of use innocently in various ways, having no relation to the publication and sale of a newspaper.* If the defendant had sold the eletrotype plate, intending or even expecting the purchasers to use it in competition with the plaintiff, he might be regarded as having sanctioned that use in advance, and consequently as occupying the position of a party acting in concert with them and responsible with them as joint *tort feasors. Wallace v. Holmes*, 9 Blatch., 65. Thus it was held in *De Kuyper v. Witteman*, 23 Fed. Rep., 871, that a defendant who had printed and sold labels in imitation of a trade-mark, with the purpose of enabling the parties to whom he sold them to palm off their goods upon the public as those of the owner of the trade-mark, was an infringer. There is no evidence, however, in this case that the defendant contemplated that the purchasers would make any illegitimate use of the plate. They could have used it, as he could, to print a trade-mark or an advertising cut, or in other ways which could not interfere with the sale of the plaintiffs' newspaper. *The law will not assume without evidence, or simply upon proof that the defendant sold the plate to the proprietors of a newspaper, that he intended to authorize a violation of the plaintiffs' rights. Averill v. Williams*, 1 Denio, 501.

"The defendant has copied the cut, but he has not printed or published it, nor has he exposed for sale any printed or published copy of any part of the plaintiffs' newspaper. Judgment is therefore ordered for the defendant."

In the Court below it was strongly urged that the doctrine of contributory infringement, in the law of patents, is applicable, by analogy, here. But, as this Court recently found, in the somewhat parallel field, of *restrictive* licenses, the cases determining the rights of patentees have to be applied with caution in copyright cases (*Bobbs-Merrill Co vs. Straus*, 210 U. S., at page 346). Whatever the supposed analogy, it is clear that the defendant's acts did not constitute infringement, according to the statutory restrictions, for the vital element is, the use of the films in a certain place and upon a certain machine, and as to these, defendant had nothing to say. When sold, its films passed wholly from its control, and the *vendees* became entirely responsible, whether used innocently or otherwise.

To take a case much more nearly parallel: Suppose defendant depicted upon its films the details of a leading surgical case, whose public exhibition would, nevertheless offend the

statutes protecting the morals of the community. The exhibitions of them in medical class rooms and in clinics would, nevertheless, be at all times permissible. Advertised and sold, as the pictures in this case are sold, through jobbers, it seems clear that no responsibility would be fastened upon defendant for their unlawful use by ultimate purchasers.

If there be an analogy with the doctrine of contributory infringement on law of patents it is in the aspect illustrated in the case of *Morgan Envelope Co. vs. Albany Co.*, 152 U. S., 425 ; there the patent covered the combination of an oval roll of paper with a special mechanism for delivering it, in sheets, to the user. The Court, assuming the patent to be valid (pp. 432-436) discussed the question whether it was an infringement to sell the oval roll "*with the intent that it shall be used with the other element.*" It held that it was not an infringement, saying (432, bottom) .

"*The real question in this case is whether*, conceding the combination of the oval roll with the fixture to be a valid combination, *the sale of one element of such combination, with the intent that it shall be used with the other element, is an infringement. We are of opinion that it is not.* There are doubtless many cases to the effect that the manufacture and sale of a single element of a combination, with intent that it shall be united to the other elements, and so complete the combination, is an infringement. *Saxe v. Hammond*, Holmes, 456 ; *Wallace v. Holmes*, 9 Blatchford, 65 ; *Barnes v. Straus*, 9 Blatchford, 553 ; *Schneider v. Pountney*, 21 Fed. Rep., 399. *But we think these cases have no application to one where the element made by the alleged infringer is an article of manufacture perishable in its nature, which it is the object of the mechanism to deliver, and which must be renewed periodically, whenever the device is put to use. Of course, if the product itself is the subject of a valid patent, it would be an infringement of that patent to purchase such product of another than the patentee ;* but if the product be unpatentable, it is giving to the patentee of the machine the benefit of a patent upon the product, by requiring such product to be bought of him."

The parallel with this case is noteworthy ; for it seems to us to be fully established that the film of pictures, of itself, is no infringement of the book copyright. Therefore complainants have no monopoly on the film—the *fugitive element* of the exhibiting machine. The film in our case, however, was not intended solely for the particular use designated for attack,

but was equally useful in many other, admittedly innocent, ways. The combination of a particular class of machines with the film is the cause of offense, and in such machines the film is a fugitive element, "perishable in its nature", which must be renewed or substituted periodically in the ordinary use of the machine. The machines, therefore, or their users, are the real transgressors, if there be infringement, for the exhibiting machine is the necessary and indispensable element, to produce what is claimed to be a dramatic entertainment—a public representation.

As has often been said in cases of contributory infringement of patents, "the test in all cases is whether the facts show an actual participation in the wrongful act complained of".

> *Canda vs. Michigan Co.*, 124 Fed. Rep., 486, 489, SEVERNS, J., C. C. A., 6th Cir., and cases there cited.

On reason and by precedent, therefore, this defendant is not amenable to the charge of infringement.

V.

If the Statute be Construed to Prohibit the Making or the Exhibition in Theatres of the Pictures, It is Unconstitutional.

Our proposition is that, if the Act in question protects copyright in a drama against any exhibition of pictures, it is stretched to cover that which was not *written* by the author, but by another, and that therefore it is unconstitutional; since that instrument limits the author's monopoly to his *writings*.

The eighth clause of the eighth section of Article I. of the Constitution provides that Congress shall have the power:

"To promote the progress of science and useful arts, by securing for limited times to authors and inventors *the exclusive right to their* respective *writings* and discoveries."

We give the broadest possible interpretation to the word "writings"; for example, as it is defined in the Century Dictionary: "The recording of words or sounds in significant characters; in the most general sense, any use of or method of using letters or other conventional symbols of uttered sounds for the visible preservation or transmission of ideas." Or, as was said in the case of *Lithographic Co. vs. Sarony*, 111 U. S., at page 53, 58:

"By writings in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, &c., by which the ideas in the mind of the author are given visible expression."

Our contention, in its essence, is, that if the author has chosen to express his ideas in words, his protection must, under the Constitution, *be limited to that form of expression*, and cannot be extended to cover an expression of the same ideas by pictures or maps or diagrams; any one of which constitutes an essentially different writing, not a copy, of the author's writing, even though it may be an exact and full expression of the same ideas. Were this not so, the copyright would protect the idea and not the form of expressing it. It is true that the art of photography may be utilized to produce copies of the original text; and that is as much an infringement of the copyright in the book as though printing or letter press had been used (*Boosey vs. Wright*, 1900 1, Ch. 122; 81 L. T. R., 265). We do not dispute that *any copy* of the copyrighted writings, however made, is an infringement. The true test is, as argued above, not the manner of reproduction, but the author's *form of expressing* his ideas.

In the *Trade Mark Cases*, 100 U. S., 82, this Court considered and classified patents and copyrights, in their relation to trade-marks, and to the Constitutional clause now under consideration. Speaking of the boundaries of the Copywright, the Court said (p. 94):

And while the word *writings* may be liberally construed as it has been, to include original designs for engravings, prints, &c., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are the *fruits of intellectual labor*, embodied in the

form of books, prints, engravings, and the like" (italics in the original).

See, also, *Higgins vs. Keuffel*, 140 U. S., 428, 431.

In his concurring opinion in the *Perforated Music Roll* case Mr. Justice HOLMES defined copyright thus (209 U. S., at page 19):

"The ground of this extraordinary right is that the person to whom it is given *has invented some new collocation of visible or audible points,—of lines, colors, sounds, or words. The restraint is directed against reproducing this collocation*, although but for the invention and the statute any one would be free to combine the contents of the dictionary, the elements of the spectrum, or the notes of the gamut in any way that he had the wit to devise. *The restriction is confined to the specific form, to the collocation devised*, of course, but one would expect that, if it was to be protected at all, that collocation would be protected according to what was its essence."

Complainants contend that the property right created by Sections 4952 and the right of excluding others created by Sections 4956 and 4965-6 include, by reason of the phrase "publicly performing or representing" it, *any such exhibition of pictures as will simulate* or even approach *that which is visible* in any dramatic production that may be based upon the book. To our minds, no clearer illustration could be afforded of appropriation the underlying ideas, as distinguished from the *writings*, than by this reading of the statute. It was open to the author to write his ideas as he willed; had he chosen to make and copyright a series of pictures embodying a tangible and definite conception of the scenes and action to which he is supposed to have given literary birth, independently of or in connection with the written description, complainants' cause of action against us would arise upon our copying *those* pictures. But there was no such expression of the writer's thoughts; and our reader, after perusing the book, gave tangible expression to its ideas as developed in her mind; our technicians posed and photographed subjects arranged in accordance with the ideas so developed; and those photographs, however viewed, or whatever effect they produce upon the mind, are not the writings of General Wallace, but our own (see Record, p. 20, § 8).

In answer to this argument our adversary cites the cases of *Daly vs. Palmer* and *Daly vs. Webster* discussed at length previously (*supra*, pp. 28–33), upon the theory that the Courts have held any representation of the scene created by the author to be an embodiment of his writings, and so an infringement of his copyright. But, in those cases, the copyright was upon a drama, and the infringement was a drama; that is the mode of expressing the ideas of the author was adopted and a copy was made. Whether (as was apparently held in those cases), the mere imitation by action, as in pantomime, of the incident to a copyrighted drama is an infringement, is not necessary to the decision of the present case, although we believe that, so to hold, would expand the statute beyond constitutional warrant. But here no complaint is made regarding the stage "business" of the drama, so far as complainants' rights are concerned, and the exhibitions complained of are purely machine operations, involving no movement or action by anybody. What is done in showing the pictures, or in taking or printing them is wholly foreign to any *writing* of General Wallace.

That the copyrighted statutes have always been construed as we contend is evidenced by repeated decisions of this Court, from one of the later of which we quote as follows (*Holmes vs. Hurst*, 174 U. S., 82, at p. 86):

"The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. *But the right is to that arrangement of words which the author has selected to express his ideas.* Or, as Lord MANSFIELD describes it, '*an incorporeal right to print a set of intellectual ideas, or modes of thinking, communicated in a set of words, or sentences, and modes of expression.* It is equally detached from the manuscript, or any other physical existence whatsoever.' 4 Burrows, 2396. The nature of this property is, perhaps, best defined by Mr. Justice ERLE in *Jefferys v. Boosey*, 4 H. L. C., 815, 867: 'The subject of property is the order of words, in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriate unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation."

That the word "writing" was intended to have the significance which we attach to it by the framers of the Constitution is undoubted. For, as was pointed out by the Supreme Court in the case of *Lithographic Co. vs. Sarony*, 111 U. S., at page 58, the subject of copyright was one with which they were entirely familiar, because of the then recent litigation in England terminated when the case of Miller vs. Taylor (4 Burr.. 2303, 2408, construing the Statute of Anne) reached the House of Lords; and plainly their use of the word "writings" (borrowed from the statute of Anne) was intended to confine the monopoly to the author's form of expressing his ideas, and the extent of that monopoly had been clearly defined by Blackstone (2 Com., 406), as follows:

"*The identity of a literary composition consists entirely in the sentiment and the language;* the same conceptions, clothed in the same words, must necessarily be the same composition; and whatever method be taken of exhibiting that composition to the ear or eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited."

See, also, *Wheaton vs. Peters*, 8 Pet., 676, 681.

In *Gibbons vs. Ogden*, 9 Wheat., 1, 188, Chief Justice MARSHALL, said:

"As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said."

If the idea and the language (and that we interpret as broadly as possible to mean the medium of communication adopted by the author) must co-exist, the Constitution is not fulfilled when the attempt is made to monopolize the ideas in a wholly different dress.

But, beyond the letter or the Constitutional clause, arises the question, whether the progress of science and useful arts will be promoted by such construction as complainant demands. The Supreme Court has recognized that the copyright statutes were passed with this object in view. *Am. Tobacco Co. vs. Werckmeister*, 207 U. S., p. 291. If the art of

representing life and motion by photographs, so greatly advanced by the efforts of meritorious inventors, is to be made dependent upon the rights of authors whose descriptions may thus be realized before the eye, it extends the property of authors to include means created wholly and independently by others. That being established, are not the objects sought by the framers of the fundamental law frustrated rather than promoted? Authors have not assisted the making of moving pictures save by contributing their ideas, which, once published, are free to all to develop and utilize, provided the authors' medium of communication is not copied. The orator, the painter, the sculptor, may advance their respective arts without paying tribute to the writer beyond the purchase of the book. Its purchase invests them with the right to absorb the ideas and to utilize them (*Baker vs. Seldon*, 101 U. S., 99, 102, *supra*, pp. 9-10). But complainants say, the photographer is excluded from similar benefit. Thus they would use the copyright as a bar to progress.

Neither General Wallace nor his assigns ever advanced the moving picture art one iota; its rapid-fire camera, its celluloid film with a sensitized surface, its methods and apparatus for developing and printing and mounting the positives, its exhibiting and projecting apparatus of many varieties, all were initiated and perfected without any contribution from them. To lay this art tribute to their copyrights, in the way attempted by their bill, is to retard the art, and to prevent defendant and others practicing it from giving its benefits to those lacking in artistic ability. In patent cases, the Courts have refused to construe a patent of doubtful utility in such a way as to prevent others from advancing the art to which it relates:

* * * "The construction claimed would operate rather to the discouragement than the promotion of inventive talent."

Deering vs. Winona Harvester Works, 155 U. S., 286, 295.

General Electric Co. vs. Winsted Co., 110 Fed. Rep., 966 (TOWNSEND, J.).

If the *purpose* of the Constitution be material in a case of that sort, it is, we respectfully submit, determinative of the issue here.

It is well settled that if an act of Congress "admits of two

interpretations, one of which brings it within, and the other presses it beyond the Constitutional authority of Congress, it will become our duty to adopt the former construction; because the presumption never ought to be indulged, that Congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous."

United States vs. Coombs, 12 Pet., at pages 72, 75.
Grenada County vs. Brogden, 112 U. S., 261.
United States vs. Central Pac. Ry. Co., 118 U. S., 235.

Without elaborating this proposition further, but in full confidence in the constitutionality of our position, we submit that the Court may not construe, the phrases "right to dramatize" and "publicly performing or representing" a dramatic composition, in Sections 4952 and 4966, to cover any exhibition of a series of pictures that are based upon the ideas portrayed by the book or drama, whatever effect they may produce upon the eye and mind of the audience.

We submit that the injunction order and the final decree should be reversed, and that the mandate of this Court should be for a dismissal of the bill of complaint with the costs of both appeals to the defendant.

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Counsel to Appellant.

APPENDIX.

For convenience we have traced the legislative antecedents of the statutes whose construction is involved in this case, being Revised Statutes, Secs. 4952, 4965 and 4966, commencing with the British Statute of Anne and following in succession with the pertinent portions of the U. S. Statutes of 1790, 1802, 1831, 1856, 1865, and after giving the text of the sections in the original revision of 1870, the successive changes by the acts of 1891, 1895 and 1897.

It will be observed that the first entrance of the right of the author of a book to dramatize his copyrighted work, into our statutes, was by the Act of March 3, 1891, amending Sec. 4952.

The history of the legislation is entirely consistent with, and indeed seems to emphasize, our contention that this right of dramatization, as well as every other right secured under the statutes, was intended to be subject to the constitutional limitation—namely, that the protection afforded is measured by the form of expression (see p. 41, *supra*).

Statute of Anne—8 Anne, Chapter 19:

"An act for the encouragement of learning, by vesting the *copies*, of printed books in the author's or purchasers of such copies, during the times therein mentioned."

"Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted and published, books and other *writings*, without the consent of the authors or proprietors of such books and *writings*, to their very great detriment, and too often to the ruin of them and their families; for preventing, therefore, such practices for the future, and for the encouragement of learned men to compose and write useful books * * * —that from and after the tenth day of April, one thousand seven hundred and ten, the *author* of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other persons or persons, who hath

or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said tenth day of April, and no longer; and that the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer; and that if any other bookseller, printer, or other person whatsoever from and after the tenth day of April, one thousand seven hundred and ten, within the times granted and limited by this act, as aforesaid, shall print, reprint or import, or cause to be printed, reprinted or imported, any such book or books without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed in the presence of two or more credible witnesses; or knowing the same to be so printed or reprinted, without the consent of the proprietors, shall sell, publish, or expose to sell or cause to be sold, published or exposed to sale any such book or books, without such consent first had and obtained, as aforesaid; then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets, being part of such book or books, to the proprietor or proprietors of the copy thereof, who shall forthwith damask, and make waste paper of them; and further, That every such offender or offenders shall forfeit one penny for every sheet which shall be found in his, her, or their custody, either printed or printing, published or exposed to sale, contrary to the true intent and meaning of this act," etc.

Act of May 31, 1790, Chapter 15 (1 Stat. at Large, page 124):

"SEC. 1. That from and after the passing of this act the author or authors of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof, or resident within the same * * *; and any other person or persons, being a citizen or citizens of these United States, or resident therein, his or their executors, administrators or assigns, who hath or have purchased or legally acquired the copyright of any such map, chart, book or books, in order to print, reprint, publish or vend the same, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books for the term of fourteen years from the recording of the title thereof in the clerk's office, as is hereinafter directed: And that the author and authors of any map, chart, book or books already made and

composed and not printed or published, or that shall hereafter be made and composed, being a citizen or citizens of these United States, or resident therein, and his or their executors, administrators or assigns, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the like term of fourteen years from the time of recording the title thereof in the clerk's office as aforesaid. And if, at the expiration of said term, the author or authors, or any of them, be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors, administrators or assigns for the further term of fourteen years," etc.

"SEC. 6. And be it further enacted, That any person or persons who shall print or publish any manuscript, without the consent and approbation of the author or proprietor thereof, first had and obtained as aforesaid (if such author or proprietor be a citizen of or resident of these United States), shall be liable to suffer and pay to the said author or proprietor all damages occasioned by such injury, to be recovered in a special action on the case founded upon this act, in any court having cognizance thereof."

Act of April 29, 1802, Chapter 36 (2 U. S. Stats. at Large, page 171).

"SEC. 2. That from and after the first day of January next, every person, being a citizen of the United States, or resident within the same, who shall invent and design, engrave, etch, or work, or from his own works and inventions, shall cause to be designed and engraved, etched or worked, any historical or other print or prints, shall have the sole right and liberty of printing, reprinting, publishing and vending such print or prints for the term of fourteen years from the recording the title thereof in the clerk's office, as prescribed by law for maps, charts, book or books * * * "

"SEC. 3. That if any print-seller or other person whatsoever, from and after the said first day of January next, within the time limited by this act, shall engrave, etch or work, as aforesaid, or in any other manner copy or sell, or cause to be engraved, etched, copied or sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause to be printed, reprinted or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof, * * * then such offender or offenders shall forfeit the plate or plates on which such print or prints are or shall be copied, and all and every sheet

or sheets (being part of or whereon such print or prints are or shall be copied or printed) to the proprietor or proprietors of such original print or prints, he shall forthwith destroy the same; and further, that every such offender or offenders shall forfeit one dollar for every print which shall be found in his, her, or their custody; either printed, published or exposed to sale, or otherwise disposed of, contrary to the true intent and meaning of this act, the one moiety thereof to any person who shall sue for the same, and the other moiety thereof to and for the use of the United States, to be recovered in any court having competent jurisdiction thereof."

This is practically a literal copy of the British Act of 1734, 8 Geo. II., chap. 13.

Statute of February 3, 1831 (4 U. S. Stat. at Large, page 436):

"SEC. 1. That from and after the passing of this act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any book or books, map, chart, or musical composition, which may be now made or composed, and not printed and published, or shall hereafter be made or composed, or who shall invent, design, etch, engrave, work, or cause to be engraved, etched, or worked from his own design, any print or engraving, and the executors, administrators, or legal assigns of such person or persons, shall have the sole right and liberty of printing, reprinting, publishing, and vending such book or books, map, chart, musical composition, print, cut, or engraving, in whole or in part for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed."

"SEC. 6. That if any person or persons, from and after the recording the title of any book or books, according to this act, shall, within the term or terms herein limited, print, publish or import, or cause to be printed, published or imported, any copy of such book or books, without the consent of the person legally entitled to the copyright thereof, first had and obtained in writing, signed in presence of two or more credible witnesses, or shall, knowing the same to be so printed or imported, publish, sell or expose ot sale, or cause to be published, sold or exposed to sale, any copy of such book without such consent in writing; then such offender shall forfeit every copy of such book" etc.

"SEC. 7. That, if any person or persons, after the recording the title of any print, cut or engraving, map, chart or musical

composition, according to the provisions of this act, shall, within the term or terms limited by this act, engrave, etch, work, or sell or copy, or caused to be engraved, etched, worked, or sold, or copied, either on the whole, or by varying, adding to, or diminishing the main design with intent to evade the law; or shall print or import for sale, or cause to be printed, or imported for sale, any such map, chart, musical composition, print, cut or engraving, or any part thereof, without the consent of the proprietor or proprietors of the copyright thereof, first obtained in writing, signed in the presence of two credible witnesses; or, knowing the same to be so printed or imported without such consent, shall publish, sell or expose to sale, or in any manner dispose of any such map, chart, musical composition, engraving, cut, or print, without such consent, as aforesaid, then such offender or offenders shall forfeit," etc.

Act of August 18, 1856 (11 U. S. Stat. at Large, page 138):

"Chapter 49. An act supplemental to an act entitled 'An Act to amend the several acts respecting Copyrights' approved February third, eighteen hundred and thirty-one."

"That any copyright hereafter granted under the laws of the United States to the author or proprietor of any dramatic composition, designed or suited for public representation, shall be deemed and taken to confer upon the said author or proprietor, his heirs or assigns, along with the sole right to print and publish the said composition, the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place during the whole period for which the copyright is obtained; and any manager, actor, or other person acting, performing, or representing the said composition, without or against the consent of the said author or proprietor, his heirs or assigns, shall be liable for damages to be sued for and recovered by action on the case or other equivalent remedy, with costs of suit in any court of the United States, such damages in all cases to be rated and assessed at such sum not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court having cognizance thereof, shall appear to be just; *provided, nevertheless,* that nothing herein enacted shall impair any right to act, perform, or represent a dramatic composition as aforesaid, which right may have been acquired or shall in future be acquired by any manager, actor, or other person previous to the securing of the copyright for the said composition, or to restrict in any way the right of such author to process in equity in any court of

the United States for the better and further enforcement of his rights."

This is evidently modeled upon, but not closely copied after the British Dramatic Copyright Act of 1833, 3 and 4 Will., IV.

Act of March 3, 1865 (13 U. S. Stat. at Large, p. 540):

"Chapter 76. An act supplemental to an act entitled 'An Act to Amend the Several Acts Respecting Copyright," approved February third, eighteen hundred and thirty-one, and to the Acts in Addition Thereto and Amendment thereof."

That the provisions of such act shall extend to and include photographs and the negatives thereof which shall hereafter be made, and shall enure to the benefit of the authors of the same in the same manner, and to the same extent, and upon the same conditions, as to the authors of prints and engravings."

* * * * * * *

"Sec. 4. That in the construction of this act the word 'book' shall be construed to mean every volume and part of a volume, together with all maps, prints or other engravings belonging thereto; and shall include a copy of any second or subsequent edition which shall be published with any additions, whether the first edition of such book shall have been published before or after the passing of this act: Provided, however," etc.

R. S., Sec. 4952, as originally enacted by Act of July 8, 1870:

"Sec. 4952. Any citizen of the United States or a resident therein who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and, in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others. And authors may reserve the right to dramatize or to translate their own works."

This was amended by Sec. 1 of the Act of March 3, 1891, Chapter 565 (26 Stat. L. 1106), so as to read as follows, the changes being indicated by italics:

" The author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and, in the case of dramatic composition, of publicly performing or representing it or causing it to be performed or represented by others; *and authors or their assigns shall have the exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States.*"

R. S., Section 4965, as originally enacted by Act of July 8, 1870, read:

" SEC. 4965. If any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this chapter, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or, knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; one half thereof to the proprietor and the other half to the use of the United States."

By the act of March 3, 1891, Chapter 565 (26 Stat. L., 1109), this was amended so as to read as follows, the changes being indicated by italics:

"SEC. 4965. If any person, after the recording of the title of any map, chart, *dramatic* or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this act, shall within the term limited, *contrary to the provisions of this act*, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch work, copy, print, publish, *dramatize*, *translate*, or import, either in whole or in part, or by varying the main design with intent to evade the law, or, knowing the same to be so printed, published, *dramatized*, *translated*, or imported, shall sell or expose for sale any copy of such map or other article as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale, and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; one-half thereof to the proprietor and the other other half to the use of the United States."

Again this section was amended by the Act of March 2, 1895, Chapter 194, to read as follows, the italicized portions indicating the change from the Act of 1891:

"SEC. 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this Act, shall, within the term limited, contrary to the provisions of this Act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate, or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied

or printed, and shall further forfeit one dollar for every sheet of the same found in his posession, either printing, printed, copied, published, imported, or exposed for sale ; and in case of a painting, statute, or statuary, he shall forfeit ten dollars for every copy of the samein his possession, or by him sold or exposed for sale : *Provided, however, That in case of any object not a work of fine arts, the sum to be recovered in any such infringement of the copyright of a photograph made from any action brought under the provisions of this section shall be not less than one hundred dollars, nor more than five thousand dollars, and : Provided, further, That in case of any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print, or model or design for a work of the fine arts or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars, and not more than ten thousand dollars.* One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States."

Revised Statutes, Sec. 4966, as orignally enacted read as follows :

" SEC. 4966. Any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court shall appear to be just."

This was amended by Act of January 6, 1897, to read as follows, the changes being indicated by italics :

" SEC. 4966. Any person publicly performing or representing any dramatic *or musical* composition for which a copyright has been obtained, without the consent of the proprietor *of said dramatic or musical composition,* or his heirs or assigns shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court shall appear to be just. *If the unlawful performance and representation be willful and for profit, such person or persons shall be guilty of a misdemeanor and upon conviction be imprisoned for a period not exceeding one year. Any injunction that may be granted upon hearing after notice to the defendant by any circuit court of the United States, or by a*

judge thereof, restraining and enjoining the performance or representation of any such dramatic or musical composition may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative and may be enforced by proceedings to punish for contempt or otherwise by any other circuit court or judge in the United States; but the defendants in said action, or any or either of them, may make a motion in any other circuit in which he or they may be engaged in performing or representing said dramatic or musical composition to dissolve or set aside the said injunction upon such reasonable notice to the plaintiff as the circuit court or the judge before whom said motion shall be made shall deem proper; service of said motion to be made on the plaintiff in person or on his attorneys in the action. The circuit courts or judges thereof shall have jurisdiction to enforce said injunction and to hear and delermine a motion to dissolve the same, as herein provided, as fully as if the action were pending or brought in the circuit in which said motion is made. The clerk of the court, or judge granting the injunction, shall, when required so to do by the court hearing the application to dissolve or enforce said injunction, transmit without delay to said court a certified copy of all the papers on which the said injunction was granted that are on file in his office."

Supreme Court, U. S.
FILED
OCT 21 1913
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM 1913.

No. 66.

KALEM COMPANY,
Appellant,
vs.
HARPER BROTHERS, MARC KLAW, ABRAHAM ERLANGER and HENRY L. WALLACE,
Appellees.

REPLY BRIEF FOR APPELLANT.

JOHN W. DAVIS,
RICHARD N. HOUPER,
Counsel for Appellant.

Supreme Court of the United States.

No. 26.

October Term, 1911.

Kalem Company,
Appellant,
vs.
Harper Brothers, Marc Klaw, Abraham Erlanger and Henry L. Wallace,
Appellees.

REPLY BRIEF FOR APPELLANT.

The learned counsel for the appellees, Klaw & Erlanger, in his brief filed in this cause presents as his first point the following (p. 7):

> "The plea having been disproved and the right to answer having been waived, the record presents nothing for review by this Court."

This objection was not made before the Circuit Court of Appeals and is suggested here for the first time. This renders it necessary for counsel for the appellant to file this supplemental brief, which is directed solely to the objection now raised.

In support of this point counsel for Klaw & Erlanger states that the plea simply sought to raise the question whether the defendant was a contributing infringer for the reason that it had not itself given the infringing performances, because it

had prepared the moving-picture films for use in moving-picture theatres, but was not actually interested in the theatres where the performances were given.

This is a very imperfect statement of the purport of the plea.

The Issue Raised by the Plea.

The plea is by terms addressed to the *whole bill of complaint.* After reciting the substantial charges of the bill of complaint the plea proceeds as follows (Rec., p. 15, fol. 26) :

> " This defendant denies that it is producing or has ever produced, either in conjunction with Kleine Optical Company or otherwise, or within the Southern District of New York or elsewhere, any reproduction of the scenes, incidents and characters of the book ' Ben Hur ' or the dramatization of said book, or that this defendant, either alone or in conjunction with any one else, has given any performance or stage representation of the scenes, characters and incidents of the said book or dramatic composition, or that it has caused or licensed others to give such performances or representations, or any production of that sort or character, or that it has, either alone or in conjunction with another or others, advertised an intention to give such representation or to license others to give such production ; or that it has represented anything to be the stage production of the complainants or any of them, whether by advertisements, post-cards, public announcements or the like."

The plea then proceeds to state the method by which the moving pictures are prepared and how they may be or are exhibited.

In the next paragraph the defendant avers that it does not itself exhibit such films for any purpose whatever, but sells the same as articles of commerce.

Then follows a statement of the method by which the defendant obtained a series of photographs of representations of incidents described in the book " Ben Hur."

Next the plea avers " that a celluloid film containing a

series of pictures and known as a moving picture film is not a performance or representation of a dramatic composition or a copy of a book within the purpose and intent of the statute."

To this plea the complainants filed a replication, by which they asserted that they "do and will ever maintain and prove their said bill to be true, certain, and sufficient in the law to be pleaded unto by said defendant, and that the plea of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by these replicants."

Issue having thus been joined upon the plea, thereby treating it as substantially sufficient, both in law and in fact, to traverse the bill of complaint, a stipulation of facts was made between the parties.

This stipulation in its initial clause reads as follows:

> "It is hereby stipulated between counsel for the respective parties that the record for final hearing upon the plea interposed on behalf of the Kalem Company shall consist of the bill of complaint and its exhibits, the plea and the replication to the plea, and the following agreed statement of facts:"

The stipulation then states in twelve different paragraphs the facts which constitute the defense of the Kalem Company to the bill of complaint on the merits.

The cause was argued upon the pleadings and the facts as contained in the stipulation, and the opinion of the Circuit Court being in favor of the complainants, a final decree without the intervention of any interlocutory decree was made. No *interlocutory* decree was possible, for the bill (Rec., p. 9), prayed for injunctive relief, only, and not for an accounting of damages.

It is important to consider the terms of this decree (Rec., p. 23, foot). It recites that the cause came on to be heard upon the bill of complaint, the plea, the replication, and the agreed statement of facts, and that upon consideration of this it was by the Court ordered, adjudged, and decreed:

> "That the statement of facts as stipulated by counsel for complainants and defendant be and they thereby were made the findings of fact of that court."

It was further ordered, adjudged, and decreed that the plea of the defendant, Kalem Company, be and thereby was in all respects overruled.

And it was further ordered, adjudged, and decreed that, as the said defendant, Kalem Company, had duly waived its right to answer the said bill of complaint, it be perpetually enjoined and restrained from producing, acting, exhibiting, printing, etc., or causing to be produced, represented, acted, exhibited, etc,, the book entitled " Ben Hur, A Tale of the Christ," or the dramatic composition entitled " Ben Hur," or of its characters, scenes, incidents, plot or story, or any simulated or colorable imitation or adaptation of said book or dramatic composition of " Ben Hur," or otherwise.

It will thus be seen that there was a full and complete hearing *upon the merits* of the cause in accordance with the issue raised by the plea and the stipulation of facts as against the bill of complaint and the replication to the plea. Not only was the question as to whether the defendant was a contributing infringer heard and decided, but the preliminary question, whether making, publishing, and exhibiting the moving-pictures constituted in law an infringement of complainants' copyright either on the book or the drama.

Since the bill asked only for the relief of an injunction, and not for further discovery as a basis for a claim of damages, or even for a reference to determine profits, there was nothing more to try, after the plea was overruled; all the facts on both sides had been put in evidence by the stipulation. So that, under proper practice, the Court could do no more than enter final decree, directing that the injunction issue. Defendant had no *right* to answer over after the issues of fact raised by plea and replication had been determined in complainants' favor.

Kennedy vs. Creswell, 101 U. S., 641.
Westervelt vs. Library Bureau, 118 Fed. Rep., 824 (C. C. A., 1st Cir.).
Eagle Oil Co. vs. Vacuum Oil Co., 162 Fed. Rep., 671, 673 (C. C. A., 3d).

True, as a matter of discretion, where substantial issues remain after disposal of the plea, the defendant may be allowed to answer over; but plainly, this was not such a case, and the defendant, when its counsel "approved as to form" (Rec., p.

24, foot) the decree, yielded to the inevitable in the Circuit Court, once the plea had been adjudicated against its contention.

Almost coincidently, defendant asserted its right to litigate the issues further, by perfecting its appeal from the final decree to the Circuit Court of Appeals (p. 25).

Defendant Waived No Right of Appeal.

There is much technical learning on the proper office of a plea in equity and the proper practice to be pursued in the various situations that may arise from either sustaining or overruling the plea on the face of the papers, or from sustaining or overruling the plea upon replication and testimony taken. For a discussion of the technical features of this branch of equity practice we refer to a recent paper read by Mr. Robert S. Taylor of the Indiana bar before the American Bar Association, on Equity Rules 33, 34 and 35 of this Court.

It does not seem to us, however, that this technical discussion is pertinent to the situation in this case, and we shall content ourselves with merely stating the well established principles of equity pleading and practice, which will be sufficient to show that there is no important question of practice that need trouble the Court before coming to a consideration of the merits of this cause.

We may preface what we have to say on this subject by calling attention to what seems to be an erroneous conception of the office of a plea on the part of counsel for Klaw & Erlanger. He states that it is doubtful whether it is the province of a plea to interpose defenses which go to the merits and do not relate to matters in abatement and in bar. Every plea in bar goes to the merits of the case as presented by the complainant.

Pleas in equity, as at law, are pleas either in abatement or in bar. Under the head of "*pleas in abatement*" are pleas to the jurisdiction, pleas to the person, and pleas to the bill. *Pleas to the jurisdiction* are, that the subject of the suit is not within the jurisdiction of a court of equity, or that some other court of equity has the proper jurisdiction, or that the defendant has not been properly served with process. Pleas to the person are to the person of the plaintiff or to the person of the

defendant, as of alienage, infancy, coverture, idiocy, lunacy, bankruptcy, etc. Pleas to the bill are pleas of another suit pending; want of proper parties; multiplicity of pleas; multifariousness.

Pleas in bar are:

1. Pleas founded on some bar created by statute;
2. Pleas founded on matters of record in some court;
3. Pleas purely matter of fact.

Beach on Modern Equity Practice, § 301.

If the defendant interposes a plea in bar to the whole bill and the complainant does not reply to it, but is disposed to question its validity, he must set it down for argument, and this answers to the demurrer at law.

Fulton vs. Greacen, 44 N. J. Eq., 443.
Flagg vs. Bonnel, 10 N. J. Eq., 82.

Where a plea is set down for argument without any replication, no objection can be taken to its form or regularity. Such objection can only be made by *exception*. But the sufficiency of the bill as to substance is tested, although its allegations are not taken so strictly against the complainant as in the case of a demurrer. By setting the plea down for argument the complainant tests its sufficiency and, in effect, demurs to it.

Beach on Modern Equity Practice, § 326 and cases there cited.

Where a plea is allowed upon argument, or the plaintiff, without argument, thinks it, though good in form and substance, not true in point of fact, he may take issue upon it and proceed to disprove the facts upon which it is endeavored to be supported.

1 Daniels Chancery Practice (1st Ed.), Vol. II., 220.*
McEwen vs. Broadhead, 11 N. J. Eq., 129.
U. S. vs. Dallas Military Road Co., 140 U. S., 599, 617.

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* This is the edition approved by this Court as "the most authoritative work on English Chancery Practice" at the time the Equity Rules were adopted—114 U. S., at page 112, foot-note.

Where the complainant conceives the plea not true in point of fact and desires to controvert it, he files a replication in the same manner that he would do if the defendant had simply put in an answer to the bill in the usual way.

If a plea, in the apprehension of the complainant, be good in matter, but not true in fact, he may reply to it and proceed to examine witnesses in the same way as in case of a replication to an answer.

Hughes vs. Blake, 6 Wheat., 453.
Farley vs. Kittson, 120 U. S., 303, 314.

Formerly such a proceeding was an admission on the part of the complainant of the sufficiency of the plea, and if the facts relied on by the plea were proved, a dismissal of the bill on the hearing became a matter of course. But Equity Rule 33 in the United States courts provides that if, when the plaintiff takes issue on the plea the facts stated therein shall be determined for the defendant, they shall avail him as far as in law or equity they ought to avail him.

In *Earll vs. Metropolitan Street Ry. Co., 87 Fed. Rep., 528*, where an issue of fact upon traverse of a plea to a bill in equity was found in part for each party, it was held by Judge WHEELER that under the 33d equity rule the defendant was entitled to the benefit of the facts so found for him, and that the decree should be limited accordingly.

In *Green vs. Bogue, 158 U. S., 478*, it was decided that in view of Rule 33, the plaintiff might properly ask the Supreme Court to review the decree of the court below sustaining the sufficiency of the defendant's plea; and it was expressly decided that the plaintiff, in putting down the plea for argument as to its sufficiency, and after that question had been determined against him, filing a replication putting at issue the facts averred in the plea, would not be held to have abandoned his right to have the sufficiency of the plea as a defense to the bill considered on appeal. Mr. Justice SHIRAS, in rendering the opinion of the court in that case, said:

> "The inequity of having a case turn on the face of a plea of perhaps immaterial facts doubtless led to the adoption of that rule (Rule 33)."

In *Pearce vs. Rice, 142 U. S., 28*, the effect of the rule was considered, and it was held that under it the court might upon final hearing do at least what under the old rule might have been done when the benefit was saved to the hearing.

In *Stead vs. Course, 4 Cranch. (8 U. S.), 403, 413*, a case cited in appellees' brief, it was declared that the only questions before this Court were upon the sufficiency of the plea to bar the action and the sufficiency of the testimony to support the plea.

That is precisely the attitude assumed by us. The cause was heard upon the pleadings and stipulations of facts. The court found the facts as stated in the stipulation to be true, and upon those facts in connection with the plea it held that the complainants were entitled to a decree. From that judgment and decree we are now appealing to this Court and ask a review of the correctness of the decree as made and affirmed below.

The suggestion that the decree is in effect *pro confesso*, even if it were true, could not bar the right of appeal.

Lovelands' Appellate Jurisdiction, Par. 47.
Thomson vs. Wooster, 114 U. S., 104.
Pacific Railroad Co. vs. Ketchum, 101 U. S., 289.

Counsel for appellees cites Section 1011, U. S. Rev. Stat., which is to the effect that there shall be no reversal in the Supreme Court upon a writ of error for error in ruling any *plea in abatement.*

It is sufficient to say that the plea in this cause is a plea *in bar*, and not a plea in abatement.

Counsel alleges in his brief that because no answer was filed with the plea, every fact stated in the bill must be taken as true, and that, therefore, the record presents nothing for this Court to consider.

But the authority he cites goes only to the situation presented *when the plea is set down for argument ;* not when complainant raises an issue of fact by filing replication to it.

We submit that such construction of the proceedings would be grossly inequitable and unjust. Final decree was made upon the bill, plea, and facts submitted in support of the plea. If there was error in the judgment and decree of the Court pro-

ceeding from a consideration of the record as thus made, it should be corrected by this Court.

There are instances where appeals by defendant from a decree for complainant on plea overruled have been heard and considered by the Circuit Court of Appeals and by this Court, and counsel have been able to find no case in which the appellate court has refused to consider all questions which properly arose upon such decree in the Court below.

Thomson vs. Wooster, 114 U. S., 104.
Kennedy vs. Creswell, 101 U. S., 641.
Dalzell vs. Dueber Mfg. Co., 149 U. S., 315.
Westervelt vs. Library Bureau, 118 Fed., 824.
Elgin Wind Power & Pump Co. vs. Nichols, 65 Fed., 215 (C. C. A., 7th Circuit).

The decree in this cause was not made because the defendant confessed the bill to be true, but because the Court having regard to the pleadings, the facts and the law, considered the defendant to have no legal defence to the action.

This we allege as error, and we ask this Court to correct it.

Respectfully submitted,

JOHN W. GRIGGS,
DRURY W. COOPER,
for Appellant.

October, 1911.

FILED

Supreme Court of the United States

OCTOBER TERM, 1911

THE KALEM COMPANY

vs.

HARPER BROTHERS

Supreme Court of the United States.

KALEM COMPANY,
Appellant,

AGAINST

HARPER & BROTHERS, MARC KLAW, ABRAHAM ERLANGER and HENRY L. WALLACE,
Appellees.

No. 26, October Term, 1911.

BRIEF FOR THE APPELLEE, HARPER & BROTHERS.

The fundamental facts upon which the plaintiffs base the relief sought by the bill are conceded, to wit: the jurisdiction of the Court, the creation by General Lewis Wallace of an original work of fiction entitled "Ben Hur," an assignment of all his rights therein, including copyrights and right of dramatization, to Harper & Brothers; the application for, and issuance of, Letters of Copyright of the book, the subsequent dramatization of the book into a play, and the issuance of Letters of Copyright thereupon.

By agreement between Harper & Brothers, who were vested with the right of dramatization of the book as aforesaid, and Klaw & Erlanger, who were granted the right to produce the dramatization of said book, it was provided as a condition that the said Klaw & Erlanger should produce the play un-

der the name of " Ben Hur," and by first-class companies only, and that the said play should be equipped and produced with such attention to detail and with such care as to preserve the atmosphere and scenic character of the story, and with a cast of players selected to interpret the characters of the play (fols. 23–24). The dramatic rights vested in Harper & Brothers could be used in no other way.

The play was produced, and Messrs. Klaw & Erlanger spent upwards of $100,000 in connection therewith, and from the outset the play became successful viewed from an artistic as well as a financial standpoint.

It was produced in 1899, in the City of New York, and played continuously thereafter until June, 1900, and afterwards it was presented in the New York Theatre and Academy of Music in the same city, and has since been produced every theatrical season since 1899, and is now being performed throughout the country (fols. 24–26).

Over $500,000 has been paid by Klaw & Erlanger for advertising and for royalties to Harper & Brothers and General Wallace and his personal representatives.

The defendant, The Kalem Company, filed a plea which admitted the essential facts set forth in the bill herein, but claimed that it manufactured films for sale in the open market which represented certain scenes and incidents from the book and play, but that it did not actually produce and exhibit in theatres or theatoriums the result of their work, it being claimed by the defendant-appellant that that part of the business was left to the purchasers of the films. The appellant caused the book to be read by a dramatist, who thereupon wrote out a description or abstract of certain portions of the book as shown in Exhibit " E," to guide the actors employed by the defendant-appellant in the representations which they were to give (fol. 34). The actors thus employed by the Kalem Company performed as required by the dramatist employed by it, and during

the performance thereof the defendant caused pictures to be taken, by means of the apparatus described. The pictures thus taken so closely followed the book and incidents thereof, and the story told in the book, as to be readily identified (fols. 34–35). In order to effect a sale of the films and to secure a market therefor, the records show that the appellant advertised and held itself out to the public as being authorized to sell the films describing in dramatic form the incidents of the book (pp. 19 and 20 of Record). The defendant thereafter sold and disposed of said films in the ordinary course of business (fols. 34–35).

It further appears that the scenes, the characters and the names of the characters are the same as those in the book. In short, under the name of "Ben Hur" are shown in the theatoriums throughout the country the characters and scenes in action which tell the story in dramatic form as told in the book.

The advertisements issued by and under the name of the Kalem Company announce that the play represented by the pictures is that of "Ben Hur" and that the scenes and incidents portrayed by the mechanical apparatus aforesaid have been adopted from the book of "Ben Hur" written by General Wallace. The facts put in issue by the pleas were stipulated and appear at pages 18–23 of the record. The facts therefore before the Court are the admission of the allegations of the bill and the facts stipulated as above.

FIRST POINT.

The defendant-appellant, the Kalem Company, is an infringer upon the complainant's rights in book and play.

Section 4952 of the Revised Statutes of the United States provides:

> "The author * * * or proprietor of any book * * * dramatical or musical composition * * * and the executors, administrators or assigns of any such person shall, upon complying with the provisions of this Chapter have the *sole* liberty of printing * * * and vending the same; and in the case of dramatic composition, of *publicly* performing or *representing* it or causing it to be *performed* or *represented* by others; and authors or their assigns shall have the exclusive right to *dramatize* and translate any of their works for which copyright shall have been obtained under the Laws of the United States."

In the present case the defendant company caused the story of the book to be told in the form of a drama, caused its actors to portray the story written by its agent especially employed for the purpose, and to enact the same while photographs were taken of that performance. This performance so taken by the use of the machines therefor is presented to the public, with scenery and additional actors and performers and descriptive text advertising and stating to the public that the play they are witnessing is "Ben Hur," founded on General Wallace's book.

The appellant's argument is that the sale by them of their product which present the scenes of the play is not an infringement of the plaintiff's rights. Putting the proposition in another form, the defendant admits it is an infringer unless it is pro-

tected by the method which it has adopted in presenting the play to the public eye.

The Copyright Act not only gives the author of a book the sole liberty of printing and vending the same but the further right of dramatization; to the author of a dramatic composition it gives the *exclusive right* of *public performance* and *representation.*

This defendant does not throw a disconnected or detached picture upon a screen in the theatres where the products of its workshop are used, but it has produced for sale a series of pictures of a dramatic performance which portrayed and represented the dramatic and appealing scenes in the story told in the book; nor do they advertise the scenes so produced as a chariot race, or an unfortunate accident, but they advertise, first, "Ben Hur," and then a series of events described in the book which lend themselves to dramatic production (pp. 19-20), and these scenes, telling the whole story of the book, are represented to the public by means of the apparatus prepared and furnished by the defendant. The characters are dressed, move and act as in the book, and tell the same story. The individuals, too, as they appear upon the screen, have the same names as those in the book. In short, the defendant frankly concedes that the series of pictures were those of a performance of a drama based upon General Wallace's book, and its advertisements and announcements inform the public that they may see for a small consideration the scenic representation of the incidents of the book. The defendant-appellant, however, endeavors to shield itself behind the *method* by which the representation to the public is made. It claims that inasmuch as it only shows *pictures* on the stage, that this cannot be held to be a violation of the complainants' rights. In answer to this argument, it could not be seriously contended by the defendant that it could employ a company of actors, costume them and give them

the names of the characters of "Ben Hur," have them enact in pantomime the scenes described in the book without being adjudged an infringer of the complainants' dramatic rights. It is well settled by authority that the representation or performance of the story told in a book by pantomime action or by marionettes is a violation of the dramatic rights in the book. This being so, can it be contended that if the actors were hidden from the eyes of the audience, but their figures and movements were reflected in mirrors skilfully placed before the audience, that such an act would not be a violation of the complainants' copyrights? It is true that the actors and scenery are not actually before the audience, but it nevertheless would witness a dramatic representation of the story of "Ben Hur." Is there any difference between the case assumed and the *methods* which have been adopted by the defendant-appellant in the case at bar?

In the present case, the actors in the pantomime do not actually perform every time the play is presented to the public by the defendant; the mirrors used by the defendant have caught and retained upon their surface forever the performance which the defendant caused to take place. The films and apparatus are the mirror. The result is identically the same; the *method* by which the pictures are shown to the eyes of the audience alone is different.

To adopt a circuitous method of public representation of scenes or incidents of a book or play will not defeat the plain intent and meaning of the Copyright Act. The courts will look through the method and deal with the result obtained.

Circumlocution and *method* did not save the defendant in

Turner v. *Robinson*, 10 Irish Chancery, 121; on appeal, 510.

It has ever been the answer of people who endeavor to appropriate the property of others to

set up that the method of annexation was new and original and not within the purview of the law.

Or else that the appropriation of the article by the annexer has been of real benefit to the bereaved, whether the latter knew it or not. This last argument is made in the appellant's brief (p. 18).

There it maintains that he has been good enough to advertise the plaintiff's name free of expense, and in so doing it has not only been a private but also a public benefactor, as it has stimulated the public to an appreciation of a literary masterpiece.

The defendant further argues that, inasmuch as it disposes of the property to other persons, it should not be blamed for the latter's acts, and it is uncharitable to call it a contributing infringer, in view of the great benefit conferred by it upon the public.

The Circuit Court was not misled by this touching appeal, but briefly said: "To this result (the infringement " of various dramatic passages in com- " plainants' copyrighted book and play) the de- " fendant undoubtedly contributes, indeed it would " seem that it is the most important contributor."

The following are the leading authorities supporting the complainants' claim to the protection of the Court:

Daly v. *Palmer*, 6 Blatchford, 256.
Daly v. *Webster*, 56 Fed. Rep., 483.

The foregoing authorities have created the law now in force upon the subject of dramatic rights. The controlling effect of these decisions has not been impaired nor affected by later decisions of the courts of this country.

The case of

White-Smith Publishing Co. v. *Apollo Co.*, 209 U. S., 1,

is no authority for the defendant.

That case presented the question whether a perforated roll of music used in connection with, and as part of, a mechanical arrangement for the repro-

duction of melodious sounds, is a copy of the staff notation of a copyrighted musical composition.

The Court held that these perforated strips of paper were not *copies* of sheet music within the meaning of the copyright law.

They were mechanical inventions used for the purpose of playing tunes mechanically on a musical instrument.

The question of public *performance or representations* did not arise, and the Supreme Court was careful so to state.

> "There is no complaint in this case of the "public performance of copyrighted music; "nor is the question involved whether the "manufacturers of such perforated music "rolls when sold for use in public performances might be held as contributing infringers."

The same conclusion was reached in the English courts in

> *Boosey* v. *Wright*, 1 Ch., 836; 69 L. J., Ch., 66,

and the reason for the conclusion was pointed out in

> *Strong Dramatic and Musical Law*, p. 81, where the author says:

> "It will be noticed that the action was "brought in respect of the copyright not performing right in these songs. Had the action been brought in respect of an infringement of the latter the result might have "been different, provided, of course, the performance had been a public one."

The facts, the *decisions*, and the equities of the case are overwhelmingly opposed to the contention of the appellant and its effort to appropriate by means of new and original methods the property rights and interests of the complainants.

SECOND POINT.

Answering the points made in appellant's brief.

The fundamental question, as stated by the appellant (see Appellants' Brief, p. 3, top), is whether the making and exhibition of a film of moving pictures infringes upon the copyright of a book or the reserved rights to dramatize a copyrighted book.

The position of appellant is again stated on page 6 of their brief, as follows:

> "FIRST: That the making and publication of a picture or a series of pictures of the incidents described in the book is not an infringement of the copyright in the book.
>
> SECOND: That the exhibition of such pictures arranged upon a film, that for the time of exhibition is a part of the machine, is not an infringement upon the book-copyright.
>
> THIRD: That such an exhibition is not a dramatic representation or production, and hence is not an infringement of any dramatic rights.
>
> FOURTH: That if the public exhibition of the films for pay be held to be an infringement of the complainant's copyright, defendant is not an infringer because it has not participated, directly or indirectly, in the public exhibition.
>
> FIFTH: That if the statute is construed so as to include making or publicly exhibiting these pictures as an infringement, it is unconstitutional and void."

Appellants' argument proceeds upon the theory that a picture of an incident described in a book, which picture is the result of the imagination of the artist designing it, cannot be held to be an infringement either of the book or of the dramatic rights reserved in the book. This point is the basis upon which the remaining argument of the appellants is

based, for they then proceed by asserting that if one picture cannot be an invasion of the copyright of the book, a great many pictures of different scenes in the book would not be an invasion either of the copyright of the book itself, or of the reserved dramatic rights.

The fundamental defect in the argument is that the appellant has entirely eliminated from its premises the essential fact in this case. The pictures which the appellant took were not pictures of unrelated incidents in the book, nor were they unconnected or detached. The plaintiffs concede, and the record discloses the fact to be, that the defendant caused the book to be read by a person skilled in such work, who thereupon wrote out an abstract of certain portions of the copyright book which lent themselves most readily to acting. The defendants thereupon procured the necessary actors, costumed them, added such accessories and accoutrements as were necessary, and had the abstract thus written out by their employee performed as the abstract required.

What the appellants' counsel described as an abstract of the book was the story told in the book, which readily lent itself to dramatic representation by actors engaged for that purpose.

The case at once, with these essential facts inserted, differentiates it from a case in which an artist has by his imagination conjured up a picture of one or two dramatic incidents in a book and has made a photograph or painting thereof. In the case at bar the pictures were photographs of actors engaged in rendering the dramatic incidents of the book and telling the story contained in the book.

It is not necessary to disagree with the argument which appellant makes, that because an author has written a book on the subject of any of the useful arts, that he may appropriate to himself, by copyrighting the book, the use of such arts; because there is nothing in the statutes of the United States relating to copyright which grants to the author of

a work upon the useful or other arts the ownership of an art or of any part thereof. Nor can the author of a book, because he has extolled virtue and denounced vice, praised bravery and deplored cowardice, claim all bravery and become the sole custodian of morality for himself and his assigns for several generations, because he has written a book describing the benefits and disadvantages arising or resulting therefrom. But the statute has given the author of a book, in addition to the exclusive right to himself and his assigns of copyrighting the same, a further and additional right, namely, that of dramatization; the language of the act reading as follows:

> "And authors, or their assigns, shall have the exclusive right to dramatize and translate any of their works for which copyrights shall have been obtained under the laws of the United States."

To assert therefore that

> *Baker* v. *Selden*, 101 U. S., 99,
> *Miller* v. *Taylor*, 4 Burr, 2331,
> *Holmes* v. *Hearst*, 174 U. S., 82,

are authorities which in any way control the decision of the Court in the case at bar, entirely overlooks the fundamental fact of this case and the last quoted provision of the statute. When the appellants state, as they do (p. 11 of their Brief), "But we do assert with confidence that the author's choice of expressing his ideas, whether written in words or in picture, in statue or in chart, and his copyright of the chosen form, nevertheless leaves the world free to adopt his ideas and to express them in any way except that selected by the author," they assert more in confidence than is supported by law, because they cannot, without a clear violation of the statute, express the ideas of an author contained in his book by dramatic action. And this, of course, is what the defendants have done.

The appellants further say (p. 11 of Brief, bottom):

> "If one, by copyrighting a book, can prevent an artist from picturing the scenes described, reason cannot afford room for the orator to use in flights of fancy the artist's created character or figures of speech, for the idea is not open to appropriation or use in one case more than in the other. But it is the writing only and not the idea that is monopolized; the mode of expression and not the thought conveyed."

The appellees respectfully insist that they can prevent an artist from picturing upon the stage in dramatic form the scenes described in a book. We quite agree with counsel for appellants that we cannot prevent an orator from using the literary production of General Wallace if the production would aid him in the delivery of a speech; but we can prevent an artist or a group of artists from presenting by action the story of the book, either in the words of General Wallace or in the words of the artists, because that is the right which was expressly granted by statute to the author of the book and his assigns.

The authorities cited by appellants, and which relate to phonograph records, perforated records and musical instruments, are and can be no authority for the appellant herein. The statute gives to copyrighters of musical compositions only a right to copy same. That is the end and term substantially of the rights of the owner of such copyright. If the statute relating to musical compositions had used the same language as that used in securing the dramatic rights of a book, the cases would have been parallel. But the difficulty with defendants' contention is that there is no such added right to the composer of music, except that of copying it; whereas to the author of a book is given the additional and exclusive right of dramatizing the story contained in the book.

The argument of the defendant evades the essen-

tial fact in the case. What it desired was to take advantage of the extraordinary popularity and money-making powers of the book and play, which were known in all English-speaking countries. What was done by the defendant was to have a dramatization of the book made by a paid dramatist, performed by paid actors, with the necessary costumes and stage setting. The defendant, for economy's sake, and for the purpose of putting the drama before people who were able to pay only five or ten cents admission, perpetuated this dramatization by photographs, so that the drama could be performed at any time, and under almost any circumstances, at many places at once and in all parts of the country. The original performance was a direct violation of the complainant's rights. That performance has not passed into oblivion, but is being repeated daily, and defendants are now reaping the benefits of it to the same extent as though all the people who have seen the representation given by them through their films, attended and paid for the original unlawful representation given to them by real actors. So that when appellants argue, as they do on page 17, that "the author's thoughts are transferred, by the alchemy of the artist's mind into ideas that may be realized by the eye," our answer is that they cannot perform that sort of chemical transformation to their profit and convert our book into a dramatic story without our consent.

The defendants' argument throughout, from the first to the last point of their brief, entirely disregards the language of the act, as follows:

> "And authors or their assigns shall have the exclusive right to dramatise and translate any of their works for which copyrights shall have been obtained under the laws of the United States."

The next contention that the appellants make is:

That the exhibition of the pictures arranged upon a film, which is dur-

ing all the time of its use a part of the machine, is not an infringement of the book copyright (Applt.'s Brief, p. 18).

Under this point the defendant argues that what has been done by it is really beneficial to the complainants, and not to their detriment, and that it has advertised the book and the play to such an extent as to make each of them more profitable to the owners.

As to this point, it seems that the owner of property or property rights should be the best judge as to the method of advertising. It seems to us a parallel case if some one, while in a watchmaker's store, should slip a watch into his pocket and depart without paying therefor, and in answer to the hue and cry raised, say that he only intended and desired to advertise the watchmaker's art in manufacturing, and that he only borrowed the watch for that purpose and intended at all times to return it, and generally to be of service to the watchmaker.

Nor does it seem to us a correct statement of law of this country that the pictures produced by the machine, do not infringe the reserved dramatic rights of the book and the drama granted by the statute to the author and his assigns. The object of having the films as part of the machine is to exhibit the dramatic performance to the public who pay to see such performance. The fact that it took skill and artistic knowledge to prepare the pictures does not relieve the defendant of responsibility for its acts in violating the plaintiff's rights than in the case of a stage manager who, with his special knowledge and great art drills the actors, costumes them, and creates a great drama out of a poor story. Certainly a pirate of the dramatic rights of a book could not justify his piracy by claiming that his great skill in the production of plays should save him from giving redress for his unlawful acts.

Answering Point III (Applt.'s Brief, p 23).

It seems that the underlying point which the defendants desire to make is that the actors are not actually before the audience, and that inasmuch as they see only pictures, there is no dramatic representation, and therefore no violation of the dramatic copyright reserved to the author of the book.

For the purpose of determining whether or not this argument is sound, let us assume that the production of "Ben Hur" was to be upon a gigantic scale; that the chariot race was to be performed with real chariots, real horses, with Emperor, Senators, generals, Tribunes, vestal virgins, and a real Roman mob. Of course such a production could not be put upon any stage, as there is no stage large enough to hold such an army of actors or to permit of an actual race. It could and would be possible, however, by the use of mirrors to have all the actions of this great performance presented to the eyes of the audience in a theatre. The actors with speaking parts could be put in the wings, and their lines could be so timed with the movements shown upon the films as completely to deceive the audience into believing that what they saw on the films was really transpiring upon the stage. Would such a performance fail to be a violation of the dramatic rights simply because what took place was not upon the stage before the audience, but in a field some yards distant, or even miles?

There has been an unauthorized dramatic performance of the story told in the book; people have come to witness it, they have paid for that privilege, and this dramatic performance was brought to pass by the acts of the defendants. The mirrors in the case are the films of the defendants' picture machine, the only difference being that the films are mirrors which have been perpetually impressed with the reflections of the great play, and which make it un-

necessary for the play to be actually performed at every exhibition. Otherwise the case supposed and the case at bar are practically the same, the method alone being different.

Answering Point IV of appellant's brief (p. 35) that defendant is not an infringer, direct or contributory.

The defendant this point concedes for the purpose of argument that there has been an infringement.

His argument is that the purchaser of the films put them to an improper use when they might have used them properly, the theory being that if they used them properly there would be no infringement, and as they had been used improperly by third persons, to wit, in theaters and theatoriums, the defendant could not be charged as an infringer, direct or contributory.

The defendant's idea of proper use of the films is shown on page 36 of its brief (top).

They might be used in the home or in school, by one individual at a time, looking through a peephole or by pasting the pictures on a thumb-book, to be manipulated so as to give the illusion of motion.

Whether the performance is given in the home or the school the result is the same: the performance is the dramatization of the story of "Ben Hur," which is the property of the plaintiffs.

Whether a performance is given for one person or one hundred the result is the same—a dramatic representation of the story in the book.

But these comparatively innocent uses for the films were not those which the defendant sought. The Kalem Company appealed to the managers of theaters and moving picture shows. It was for this profitable class that the films were adopted. The advertisements were addressed to them (Record, pp. 19, 20).

As between the purchasers of the films and the

defendant, who are the real infringers or wrong-doers?

The purchasers of the films may have believed that the films so purchased were prepared under an arrangement with the owners of the copyright of the book, and the play.

The defendant however knew when it purchased "Ben Hur" that the book was copyrighted, that the dramatic rights belonged to the owner of the copyright.

The following are the facts established in this connection:

The defendant procured the services of one familiar with work of that character to read the book "Ben Hur" and to write out a description of the book, which description related to the paramount dramatic elements of the book, which are described in Exhibit "E" (p. 19 of the Record) as follows:

Jerusalem rebels at Roman misrule.
The family of Hur.
An unfortunate accident.
Wounding of the Procurator.
Ben Hur in chains to the galleys.
Ben Hur adopted by Arius and proclaimed a Roman citizen.
Ben Hur and Messala, the Challege, the Chariot Race.

(1) Grand triumphal entry of chariots.

(2) The Start.

(3) First time by.

(4) Second time by.

(5) A dash for the finish.

(6) The finish.

Ben Hur the victor.

The description of the book was so cleverly written that it could be closely followed in action.

Thereafter it procured certain persons and animals and accoutrements therefor and caused these actions and motions so described by the dramatist to be performed.

While the performance was taking place the defendant caused pictures thereof to be taken by the aid of a moving picture film, using for that purpose those of its employees who were sufficiently familiar with the photographic apparatus to make the pictures available. The negative films thus having been taken, the defendant caused its employees to prepare portions thereof for exhibition.

Having thus prepared the films for use upon the market, in order to create a demand for its product for use in theatres and theatoriums and places of exhibition, the defendant advertised the same to the trade in general, and distributed extensively postal cards and advertising circulars of the characters shown by Exhibits E and F annexed to the bill of complaint (pp. 13 and 14 of the Record).

In addition to that postals similar to said exhibits were sent by defendant to many hundreds interested in the moving picture business, including proprietors of theatres and theatoriums throughout the United States.

The pictures taken by the defendant of the dramatic performance which they caused to be had represent the esential features of the story of "Ben Hur" so as to be really identified. It appears from the exhibits that the name "Ben Hur" was featured and that the book "Ben Hur" was written by General Wallace? The names of the actors in the pictures shown were those of the leading characters in the book. The films thus having been taken and prepared for sale, and the advertisement having been placed before the dealers and jobbers, the Kalem Company subsequently sold to many of the dealers the said films for the purpose of public exhibition. Others of the dealers and jobbers and managers of theatres and theatoriums rented or hired

their films for temporary purposes. The exhibition was given in the various places of public amusement under the name or title of "Ben Hur."

It also appears that the defendant makes it a practice through its officers and employees of preparing scenarios and descriptions of stories which are shown by pictures and to properly portray the story of the scenario actors are employed and drilled for the purpose of photographs of the moving picture apparatus of the defendant.

The Circuit Court and the Circuit Court of Appeals found upon the facts that the defendant was an infringer.

The primary cause of the wrong was the act of the defendant. If it had not dramatized the work the films could not have been used by the theatres and moving picture shows.

The defendant contends (p. 38, Brief) that the defendants are not responsible for the ultimate use of the films. It might as well contend that they would not be responsible for selling the drama which their employee prepared from the book, arguing that they did not believe any one purchasing the drama would cause it to be performed.

THIRD POINT.

The judgment should be affirmed.

JOHN LARKIN,
Counsel for Harper & Brothers.

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No. 26.

Supreme Court of the United States.

OCTOBER TERM, [redacted] 1911

[redacted]

Office Supreme Court, U. S.
FILED.
JUL 29 1911
JAMES H. McKENNE
Clerk

KALEM COMPANY,

Appellant

vs

HARPER BROTHERS, MARC KLAW, ABRAHAM ERLANGER and HENRY L. WALLACE,

Appellees

BRIEF FOR APPELLEES, KLAW & ERLANGER.

DAVID GERBER,

Counsel for Appellees,

Klaw & Erlanger.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Supreme Court of the United States.

KALEM COMPANY,
Appellant,

against

HARPER BROTHERS, MARC KLAW, ABRAHAM L. ERLANGER, HENRY L. WALLACE, as Administrator of the goods, chattels and effects of Susan E. Wallace, deceased,
Appellees.

No. 184.
October Term, 1910.

BRIEF FOR APPELLEES, KLAW & ERLANGER.

Statement of the Case.

The late General Lewis Wallace was the author of a book entitled "Ben Hur, a Tale of the Christ", the manuscript of which was assigned to the appellees, Harper & Brothers, a well known firm of book publishers (Record, p. 3, bottom, p. 4 top); and in publishing it, due notice was given that "all rights" were reserved (Record, p. 4). The book was capable of being dramatized, and the story, as told in the book, made its representation on the stage practical and effective, and so

in 1889 Harper & Brothers, with the consent and approval of General Wallace, arranged with the appellees, Klaw & Erlanger, who are well known producers of plays, to have the book dramatized for stage production (Record, p. 5). This resulted in a dramatization of the novel and a stage production under the title of "Ben Hur", which was also duly copyrighted (Record, p. 5).

The play, as in the case of the book, was a great success. Over $100,000 was spent in the production (Record, p. 6) and down to the time the bill was filed, over $300,000 had been spent by Klaw & Erlanger in advertising it (Record, p. 6), and there had been paid to the complainants, Harper & Brothers and General Wallace and his Executrix, and after her death, to the appellee, Henry L. Wallace, the son of General Wallace, upwards of $200,000 in royalties. This was *in addition* to the royalties derived from the publication of the book.

Under the arrangement with Harper & Brothers and General Wallace, the stage performance by Klaw & Erlanger could only be made with a first class company and in first class theatres (Record, bottom p. 5, top p. 6), and a stage production was made more stupendous than any that had ever been given before (Record, top p. 6).

The first representation of the play in the City of New York (Borough of Manhattan) was in November, 1899, and its success was such that the performances continued, without interruption, until the following June—a period of about seven months (Record, p. 6), *and from 1899 to the time of the filing of the bill in 1908, it was uninterruptedly performed with great success and profit to the appellees* (Record, p. 6).

Statement of the Case.

The appellant, Kalem Company, is a New York corporation, whose principal business is the production and sale of films used, in what are known as moving picture theatres, for performances to be given in those theatres (Record, p. 18, bottom).

The appellant, in view of the great success of "Ben Hur", as a book, and of its dramatization and production upon the stage, conceived the idea of preparing a stage representation of "Ben Hur" for moving picture theatres. Of these moving picture theatoriums there are many *thousands* throughout the cities of the United States, and several hundred in the Southern District of New York (Record, p. 19, bottom). These theatres have an auditorium, to which an admission fee of five or ten cents only is charged (Record, p. 19, bottom, p. 7 top), and are licensed as places of public exhibition and amusement, and cater to and are patronized by theatregoers desiring to witness public exhibitions at low prices (Record, p. 19), only differing from a theatre in that, while many have a stage and curtain, all lack scenery (Record, p. 19).

To arrange for these stage representations of "Ben Hur", the appellant procured one Gene Gauntier, to abstract the essential portions of the book, in such form and substance that the description could be closely followed in action. Thereupon it procured actors and animals and their accoutrements, and caused to be performed the actions and motions described by said Gauntier, and during the performance, defendant caused a negative moving picture film to be taken by its own apparatus, using the special and high skill of certain employees that is

requisite for the successful taking of moving pictures. Thereafter it caused its specially skilled employees to reproduce from such films suitable positives for exhibition. These pictures *correctly represent sufficient of the story of "Ben Hur" to be readily identified.* When the pictures were taken, the Kalem Company expected that the said films, or some or all of them, would be put to various uses to which moving pictures can be put, including exhibitions in theatoriums and theatres, where many of the positive films were ultimately used (Record, p. 20, bottom, p. 21, top).

What the appellant did was just what a dramatist does who dramatizes a novel. He first writes out a scenario of the story of the book, leaving out such portions as, in his opinion, are not requisite or appropriate for dramatic action. From this he prepares his dramatization telling the story outlined in his scenario. Gauntier prepared a scenario of the story from the copyrighted book, taking sufficient of the book to correctly tell the story of "Ben Hur" (record, p. 20, bottom).

The allegations of the bill, not denied by the plea, are that the scenes, characters and incidents of the book of General Wallace were taken so as to permit of a representation upon the stage, showing the scenes and the characters in action, as produced by the complainants, and *telling the story as told in the book of General Wallace, and in the dramatization thereof* (record, p. 6, bottom, also p. 7).

The defendant's dramatization was produced under the title of "Ben Hur," with such success that before the bill could be filed *over* five hundred performances had been given in theatres

and theatoriums (Record, p. 21) of which many hundreds are within the Southern District of New York (Record, p. 19).

The defendant extensively advertised the fact that it had a production of "Ben Hur," *sending postal cards to moving picture proprietors, to create a demand for the films and their use in theatres and theatoriums and places of amusement* (Record, p. 20). The postals similar to Exhibits "E" and "F", annexed to the complaint, (found in the record at pp. 19 and 20), were sent by the appellant to many hundreds interested in the moving picture business, including managers and proprietors of theatres and theatoriums throughout the United States. It resulted in the stage performances complained of to which persons were attracted by the announcement that "Ben Hur" was being performed (Record, pp. 21-7).

On motion for an injunction *pendente lite,* Judge Lacombe wrote a memorandum opinion, as follows:

> "The result obtained when the moving pictures are thrown upon the screen is within Daly *v.* Webster, an infringement of various dramatic passages in complainants' copyrighted book and play. To this result defendant, Kalem Company, undoubtedly contributes, indeed it would seem that it is the most important contributor. Injunction will issue as prayed."

The appellant *did not answer or demur to the bill, but interposed only the plea* found in the record, pp. 14, 15 and 16. This plea presented *only* the question whether the defendant is a contributing infringer, because as it claims, it did not *itself* actually give the performances.

The plea, after quoting from the bill of complaint, which charges that the appellant did produce and cause to be produced upon the stage, under the title of "Ben Hur," substantially a reproduction of the scenes and incidents of the book "Ben Hur" and of the complainants' dramatization thereof, denies that "*it* is *producing* or has ever *produced*" any reproduction of the scenes, incidents and characters of the book "Ben Hur", or the dramatization of the said book, or that either alone or in conjunction with anyone else, *it has given any performance or stage representations* of the scenes, incidents and characters of the book (Record, p. 15).

The plea then alleges affirmatively that the defendant is a corporation, organized under the laws of the State of New York, and *that the principal part of its business is the production and sale of pictures such as are used in moving picture apparatus, which pictures are made to represent persons and objects in motion;* that the defendant does not itself exhibit such positive films, or such negative films for any purpose whatever, but sells them as articles of commerce (Record, p. 16).

The plea was traversed by replication (Record, p. 17), and the final hearing came on to be heard on a stipulation of facts, respecting the plea and traverse (Record, p. 18).

The plea was in all respects overruled, and the defendant *waiving its right to answer the bill,* the court issued its injunction as prayed for (Record, pp. 23 and 24).

On appeal to the Circuit Court of Appeal the final decree was unanimously affirmed (see opinion, record, pp. 31; 169 Fed. Rep. 61).

In the appellant's statement of the case some reference is made to an action at law brought

against the defendant, under section 4966 U. S. R. S., and an inference is asked to be drawn that the outcome of the case is awaiting the determination by this court of the questions of law involved (appellant's brief, p. 2). There is nothing in this record, respecting that action at law. If any reference at all is to be made thereto, it would be fairer to refer to the answer which was interposed in that action by the defendant *placing in issue the material allegations of the complaint, and controverting liability under section 4966, notwithstanding the affirmance by the Circuit Court of Appeals of the decree in this suit.*

I.

The plea having been disproved, and the right to answer having been waived, the record presents nothing for review by this court.

The plea, as we have stated, simply sought to raise the question whether the defendant was a contributing infringer, for the reason that it had not itself given the infringing performances, because it had prepared the "moving picture films for use in moving picture theatres," but was not actually interested in the theatres where the performances were given (see record, pp. 14, 15, 16).

It is doubtful whether it is the province of a plea to interpose defenses which go to the merits and do not relate to matters in abatement or in bar.

Korn *v.* Wiebusch, 33 Fed. Rep. 50.
Knox Rock Blasting Co. *v.* Rairdon Stone Co., 87 *id.*, 969.
Sharp *v.* Reissner, 9 *id.*, 445.
Union Switch, &c., Co. *v.* Philadelphia R. R. Co., 69 *id.*, 833.

The proper office of a plea, in equity, is to present some distinct fact which of itself creates a bar to the suit or to that part to which the plea applies. Every fact charged in the bill which, if true, would defeat the plea, will be taken as true, unless denied by an answer.

A plea may be supported by an answer to meet any specific charge in the bill which otherwise would defeat the plea.

Bogardus *v.* Trinity Church, 4 Paige, 178,
See 32nd and 37th Equity rules.

On a replication filed to the plea, no fact is at issue but the truth of the matter pleaded. If the plea is sustained the bill must be dismissed. If, however, the plea is disproved on an issue of fact, the respondent can enter no further defense, and a decree will be made against him.

Equity Rule 34, however, provides that "upon the overruling of any plea * * * the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea * * * in default whereof the bill shall be taken against him *pro confesso, and the matter thereof proceeded in and decreed accordingly.*"

Farley *v.* Kittson, 120 U. S. 303.
Dalzell *v.* Dueber Watch Case Mfg. Co., 149 U. S. 315.

Record Presents Nothing for Review.

Kennedy *v.* Creswell, 101 U. S. (11 Otto) 641.

Stead *v.* Course, 8 U. S. (4 Cranch) 403.

Westervelt *v.* Library Bureau, 118 Fed. Rep. 824.

Earll v. Metropolitan St. Ry. Co., 87 Fed. Rep. 528.

Lillienthal *v.* Washburn, 8 Fed. Rep. 707.

United States *v.* California & Oregon Land Co., 148 U. S. 31.

The facts set forth in the plea having been disproved, and the right to answer waived, the bill, under the 34th equity rule was "taken against" defendant "*pro confesso*" and "the matter thereof proceeded in and decreed accordingly." This court will not therefore sit to review *the facts* which were set forth in the plea, because they were disproved.

> "The merits of the claim cannot be examined. The only questions before this court are upon the sufficiency of the plea to bar the action, and the sufficiency of the testimony to support the plea as pleaded."
>
> Stead *v.* Course, 8 U. S. (4 Cranch) 403-413.

> "There shall be no reversal in the Supreme Court, or in the Circuit Court, upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."
>
> Section 1011, U. S. R. S.

> "Appeals from the circuit courts and district courts, acting as circuit courts, and from

district courts in prize causes, shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error."

Section 1012, U. S. R. S.

"Where the only matter presented by the bill of exceptions arises upon the exceptions to the general finding by the court for the plaintiff, upon the evidence, no question of law is presented which this court can review." (Syllabus.)

Town of Martinton *v.* Fairbanks, 112 U. S. 670, s. c. 28 Law Ed. 862.

"Where the trial below is by a court without a jury, a general finding prevents all inquiry by the court into the special facts and conclusions of law, on which it rests." (Syllabus.)

Boardman *v.* Toffey, 117 U. S. 271, s. c. 29 Law. Ed. 898.

To same effect:

British Queen Mining Co. *v.* Baker Silver Mining Co., 139 U. S. 222.
Dooley *v.* Pease, 180 U. S. 126, s. c. 45 Law. Ed. 457.
U. S. Fidelity Co. *v.* Board of Com'rs, 145 Fed. Rep. 144-151.
Paul *v.* Delaware, &c. Co., 130 Fed. Rep. 951-956.
Walker *v.* Miller, 59 Fed. Rep. 869.

But even if this court were to weigh the evidence on the issue presented by the plea, it would lead to the same irresistible conclusion—that this record presents nothing for review.

Record Presents Nothing for Review.

> "Upon argument of a plea, every fact stated in the bill, not denied by the answer in support of the plea, must be taken for true."
>
> Roche *v.* Morgell, 2 Sch. & Lef. 721-725-727 cited with approval in Farley *v.* Kittson (*supra*).

The bill alleges that "the defendants, Kalem Company and Kleine Optical Company (upon which latter company no service was effected), produce and cause to be produced upon the stage, under the title of 'Ben Hur', a substantial reproduction of the scenes, incidents and characters of the book 'Ben Hur', and of the dramatization of said book, advertising and announcing that the said representation and stage production is adapted from Gen. Lew Wallace's famous book 'Ben Hur', and of the play 'Ben Hur', with the scenes, characters and incidents" (see Record, p. 6).

It further alleges that "said defendant, Kalem Company, has caused pictures to be taken of the various scenes, characters and incidents of the said book of Gen. Lew Wallace, entitled 'Ben Hur', which, in connection with certain machines used by the defendant Kleine Optical Company permit a representation on the stage of the said characters, scenes and incidents of said book and dramatization of 'Ben Hur', which pictures are what is commonly called 'moving pictures', representing the different characters in action, so as to tell the story of 'Ben Hur', as produced by your orators upon the stage. The representation is given upon the stage and the moving pictures show all the characters and scenes in action, as produced by your orators, and tell the story as

told in the book of Gen. Lew Wallace, and in the dramatization thereof herein referred to" (Record, p. 6).

"That the said defendants, for a small sum, give performances and stage representations of the scenes, characters and incidents of the said book and dramatic composition 'Ben Hur', advertising and announcing the fact, and have caused and licensed others to give productions of the said scenes, characters and incidents under the said title, deriving a large revenue therefrom" (Record, pp. 6 and 7).

"* * * That the productions, as given by the defendants and their licensees, are not only given under said title 'Ben Hur', but are published, advertised and announced and declared to be the play 'Ben Hur', dramatized and adapted from the book of the said Gen. Lewis Wallace, and the production and representation as given, tell the same story told in the book of the said Gen. Lewis Wallace, and the said dramatization of said book, hereinbefore referred to" (Record, p. 7).

"That the defendants, in canvassing and offering to produce, and license others to produce the said stage production 'Ben Hur', represent it to be the stage production of the complainants, by means of advertisements, postcards and public announcements, adopting such and other divers means to mislead the public in believing that the productions given are of said copyrighted play 'Ben Hur'" (Record, p. 7).

There having been no answer filed with the plea, and every fact stated in the bill, not denied by an answer in support of the plea, being taken

as true, the record presents nothing for this court to consider.

II.

If there is anything to review, it is only the question whether the Trial Court was justified in finding, as a fact, that the appellant was a contributing infringer.

The first eleven assignments of error when analyzed will be found to be directed to the point raised in the plea respecting the fact of liability of the defendant as a contributing infringer, and the remaining four assignments of error are addressed to the constitutional question intended to be raised as to the proper construction of the word "writings", found in the eighth clause of the eighth section of Article I of the Constitution (Record, p. 26).

The *principal part of the defendant's business* is stated by it, in its plea, to be "the production "and sale of pictures, such as are used in moving "picture apparatus" (see plea, record, bottom p. 15). The films are commonly termed "moving picture films" (Record, top p. 16).

To further, what defendant pleads is "the principal part of its business", and having in view the enormous success of the dramatization and stage production of "Ben Hur" by the complainants, the defendant prepared from the copyrighted book of "Ben Hur", a scenario showing charac-

ters, scenes and incidents so as to "tell the story of 'Ben Hur' as produced by your orators upon the stage" (record, bottom p. 6).

It caused a performance, with the aid of persons, animals and their accoutrements, to be given before a high speed camera, and during the performance, caused a negative moving picture film to be taken (see stipulation of facts, record, p. 20). The said pictures so taken "*correctly represent sufficient of the story of 'Ben Hur' to be readily identified*" (stipulation of the facts, bottom p. 20).

It was further admitted or stipulated that "*when said pictures were taken, the Kalem Company expected that the said films, or some or all of them would be put to various uses to which moving pictures can be put*" as described in the stipulation of facts "*including exhibitions in theatoriums and theatres*" (record, p. 20).

The plea alleges "that *in order to create a demand for its films, and their use in theatres and theatoriums and places of exhibition*, and to advertise the same in the trade, the Kalem Company *extensively* distributes postal cards and advertising circulars such as Exhibits E and F annexed to the bill of complaint" and postals similar to said Exhibits were sent by the Kalem Company *to many hundreds interested in the moving picture business, including managers or proprietors of theatres and theatoriums throughout the United States* (record, top p. 20).

"Many of said positive films were ultimately sold to and used in theatres and theatoriums and other places of amusement, charging admission to the public. That the said theatres and theatoriums may rent or hire the said films for the pur-

pose of public exhibition of said moving pictures, at a small sum per week, and most of the public places of exhibition using the said films, *use them for but one week, when the exhibition is changed.* That the said exhibitions are given in said places of public amusement *under the name or title of 'Ben Hur', but so advertised without defendant's protest.* That the number of such exhibitions has been at least five hundred." (See stipulation of facts, record, bottom p. 20; top p. 21.) (Italics ours.)

Exhibits E and F annexed to the bill (record, pp. 19 and 20) admitted to have been sent by the defendant to many hundreds interested in the moving picture business, including managers or proprietors of theatres and theatoriums throughout the United States, call attention to the fact that the moving picture performance which can be given by the use of the film is of "Ben Hur", adapted from General Lew Wallace's famous book "Ben Hur", and that it is positively the most superb moving picture spectacle ever produced in America.

In view of the admitted facts found in the bill, plea and stipulation of facts, it would seem to us to be idle to argue that the defendant is not a contributing infringer.

Accepting the admitted facts the conclusion is irresistible, as well stated by Judge Lacombe, that "the defendant, Kalem Company *undoubtedly* contributes; indeed, it would seem that it is the most important contributor."

The learned counsel for defendant argue that the films were dealt in as vendable articles of commerce and that use *may* be made of the films in homes, or in machines where they may be seen

by one person at a time through a sight opening or peep-hole, and that they may be cut up and successive pictures can be pasted on the leaves of a thumb book, which by suitable manipulation may be made to cause the illusion of motion.

This film was one thousand feet in length (see Ex. "E", Rec., p. 19). Imagine a person separating pictures from a film one thousand feet in length, pasting them on the leaves of a thumb book, and then manipulating them to cause the illusion of motion. Was it for that purpose that Exhibits "E" and "F" were prepared and sent to "hundreds interested in the moving picture business, including managers or proprietors of theatres and theatoriums throughout the United States?" Can it be seriously contended that all this expense was incurred by the defendant in preparing this film one thousand feet in length, in the expectation that it would be manipulated by an individual after pasting the pictures on the leaves of a book?

The record is silent as to whether a single person was found throughout the United States insane or industrious enough to do a thing of that sort.

The Kalem Company is not only a "contributing infringer" but much worse. It seduces others into becoming infringers by the attractiveness of the terms which it offers. The innocent proprietor of a "moving picture" theatre may have had no thought of infringing "Ben Hur", but is induced to do so by the advertising cards of defendant, calling attention to the "Most Superb Moving Picture Spectacle ever produced in America" (Ex. E., Rec., p. 89), performance of which it offers to permit to be given. The prob-

abilities are that the theatre proprietors would never have thought of infringing "Ben Hur", *certainly not of going to the expense of preparing the film, were it not for the defendant furnishing the means for giving the infringing performance and inducing him to give it.*

There would be no infringing theatre proprietor were it not for this "contributing infringer."

Why waste time in arguing that *possibly* the one thousand feet of film may be mounted on the leaves of a little book to be manipulated by the thumb or placed in machines where they may be seen by one person at a time, through a sight opening.

The important fact is what it actually did. It sent postals to many hundred proprietors of moving picture theatres in the United States, to induce performances to be given at such theatres of "Ben Hur," resulting in the giving of the performances. The Circuit Court of Appeals well said: "Inasmuch as it (defendant) advertises the films as capable of producing a moving picture spectacle of 'Ben Hur', and sends its advertisements to proprietors of theatoriums with the expectation and hope that they will use them for public exhibitions, charging an entrance fee, and inasmuch as many of these proprietors have so used them, the defendant is clearly guilty of contributory infringement" (169 Fed. Rep. at p. 64).

Defendant quotes at length from Harper *v.* Schoppell, 26 Fed. Rep., 519. In that case, Harper & Brothers, (complainants in this case) copyrighted "Harper's Weekly", which contained a cut entitled "Getting Married, Keeping House." This illustration was not copyrighted independently of "Harper's" publication. The defend-

ant, in ignorance of the complainants' rights, purchased a copy of the cut from a third party, from which an electrotype plate was made and sold to the "New York Illustrated Times." The Court held that if Harper & Brothers had copyrighted the cut independently of the newspaper,

> "a reproduction of the copyrighted thing would have been piracy, however innocent the defendant might have been of intentional wrong. They preferred to copyright their newspaper and secure protection for it as an entire work."

Then the Court proceeds to say that the "book" or newspaper is infringed by "copying" the same, and that to constitute an infringement by "copying" depends upon the extent and character of the portion of the book copied. The Court continues:

> "If the defendant had sold the electrotype plate, intending or *even expecting* the purchasers to use it in competition with the plaintiff, he might be regarded as having sanctioned that use in advance, and consequently as occupying the position of a party acting in concert with them and responsible with them as joint tort-feasors."

When this same case came again before Judge Wallace on motion for a new trial (28 Fed Rep., 613), he granted plaintiff a decree saying:

> "Upon the conceded facts appearing in the stipulation filed for the purposes of the trial, the defendant has made an electrotype copy of 'an important, substantial, and material part' of the plaintiffs' copyrighted illustrated newspaper, and sold the plate to the proprietor of another illustrated newspaper pub-

lished in the same city where the plaintiffs' newspaper is published, *the defendant knowing at the time of selling the plate that it would be used by the purchaser for printing and publishing in such newspaper the matter copied by defendant. Under such circumstances the defendant is in no better position than he would be if he had himself printed and published the copyrighted matters in the purchaser's newspaper, because, as was stated* in *Harper's vs. Shoppell,* 26 Fed. Rep., 519, 521, *he is to be regarded as having sanctioned the appropriation of the plaintiffs' copyrighted matter, and occupies the position of a party acting in concert with the purchaser who printed and published it, and is responsible with him as a joint tort-feasor. Wallace vs. Holmes,* 9 *Blatchf.,* 65; *De Kuyper vs. Witteman,* 23 Fed. Rep., 871; *Travers vs. Beyer,* 26 Fed. Rep., 450." (All italics in this brief are ours.)

III.

A public representation of a substantial part of complainants' copyrighted book is a violation of their exclusive right to dramatize the novel, and of their sole liberty of "publicly performing or representing it, or causing it to be performed or used by others."

Apart from the single issue raised by the bill, plea and replication, the performances to which the defendant contributed are clearly in violation

of the rights secured to the complainants by the copyright statute.

The first statute passed in England giving protection to literary property was 8 Anne, Chap. 21, adopted in 1710. That act was limited to granting to an author of a book the sole liberty of printing and re-printing for a term of fourteen years, with the right to a second term of fourteen years, if the author was still living when the first term expired.

In *1833* the author of any dramatic piece or entertainment was given the *sole liberty of representing or causing it to be represented* at any place of dramatic entertainment (3 and 4 William IV, Chap. 15).

Before the adoption of the Federal Constitution of 1787, various states had passed statutes securing to authors of books the exclusive right of printing, publishing and vending the same. New York passed a statute to that effect in 1786 (2 Laws of New York, Jones & Varick, Ed. 1789, page 320).

Following the adoption of the Federal Constitution, the first Copyright law passed was in 1790 (1 U. S. Statutes at Large, 124), which gave to an author a copyright in *maps, charts and books* for fourteen years and provided for a second term for the same period if the author should be living at the expiration of the first term. This, it will be noticed, was modeled somewhat after the statute of 8 Anne.

In 1802 (2 U. S. Statutes at Large, 171), protection by copyright was extended to include the art of designing, engraving, etchings, historical and other prints.

These two statutes were repealed by the Act of 1831 (4 U. S. Statutes at Large, 436), which em-

bodied the entire subject of copyright in one Act. It enlarged the term of protection from fourteen to twenty-eight years, with the right to an extension of fourteen years.

In 1856 Congress passed an act giving to authors of a *dramatic composition,* not only the exclusive right of publication, *but the sole liberty of performing or causing it to be performed in public* (11 U. S. Statutes at Large, 138). *This was the first statute in the United States that gave authors an exclusive right to their stage productions.*

In 1870 the entire subject of copyright was embodied in one Act (16 U. S. Statutes at Large, 212), and there were added to the subjects which were protected, paintings, drawings, chromos, statues, statuary and models or designs, intended to be perfected as works of the fine arts.

The Act of 1870 was embraced in the revision of the Statutes in 1873-1874, and by Section 4952 it was provided:

> "Any citizen of the United States, or resident therein, who shall be the author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs, intended to be perfected as works of the fine arts, and the executors, administrators or assigns of any such person, shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same; *and in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by*

others. And authors may reserve the right to dramatize and translate their own works."

In 1891, Section 4952 of the Revised Statutes was amended so as to provide as follows:

> "* * * and, in the case of dramatic composition, of publicly performing or representing it or causing it to be performed or represented by others; *and authors or their assigns shall have the exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States.*"

It will be noticed that the amendment gives to "authors or their assigns", the exclusive right to *dramatize* and translate any of their works for which copyrights shall have been obtained under the laws of the United States, without even the requirement of *notice* of reservation of any rights. That right is embraced in and a part of the copyright of the book. It is vested in the author, whether or not he has dramatized his novel.

Drone on Copyright, pages 440 and 456.

The sentiment of various countries on this subject is indicated by the report of the Berlin Conference of 1908.

At this Conference held in October and November, 1908, there were represented of the signatory states Belgium, Denmark, France, Germany, Great Britain, Italy, Japan, Luxembourg, Monaco, Norway, Spain, Sweden, Switzerland and Tunis. Of the non-union countries there were also represented twenty in number. The United States was represented by Mr. Thorvald Solberg, Register of Copyrights.

Public Representation Infringes Copyright.

The Convention which was signed November 13, 1908, in pledging the contracting parties to secure protection of the rights of authors in their literary and artistic works, has two articles of interest on the question we are discussing.

Article 12:

> "Among the unlawful reproductions to which the present Convention applies are specially included *indirect, unauthorized appropriations* of a literary or artistic work, such as adaptations, arrangements of music, transformations of a romance or novel or of a poem into a theatrical piece and *vice versa*, etc., *when they are only the reproduction* of such work in the same form or in another form *with non-essential changes, additions or abridgments and without presenting the character of a new, original work.*"

Article 14:

> "*Authors of literary, scientific or artistic works, have the exclusive right to authorize the reproduction and the public representations of their works by means of the cinematograph.*
>
> Cinematographic productions are protected as literary or artistic works when by the arrangement of the stage effects or by the combination of incidents represented, the author shall have given to the work a personal and original character.
>
> Without prejudice to the rights of the author in the original work the reproduction by the cinematograph of a literary, scientific or artistic work is protected as an original work.
>
> The preceding provisions apply to the reproduction or production obtained by any other process analogous to that of the cinematograph."

Where a cinematographic production is an original work in itself, that is to say, not an infringement upon, or taken from some other literary, scientific or artistic work, such production may, itself, be protected from other infringers.

The Pan-American Treaty of 1902, which went into effect July 1, 1908, between the United States and sixteen countries, to wit: Argentine Republic, Bolivia, Colombia, Costa Rica, Chile, the Dominican Republic, Ecuador, Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Uruguay, contains these significant articles:

> "Art. 3rd: The copyright to literary or artistic work consists in the exclusive right to dispose of the same, to publish, sell and translate the same or to authorize its translation, and *to reproduce the same in any manner*, either entirely or partially." * * *
>
> "Art. 12th: All *unauthorized indirect* use of a literary or artistic work, which does not present the character of an original work, *shall be considered as an unlawful reproduction.*" * * *

The term "Literary and Artistic Works" is given a definition in Article 2d as follows:

> "Under the term 'Literary and Artistic Works,' are comprised books, manuscripts, pamphlets of all kinds, no matter what subject they may treat of, and what may be the number of their pages; dramatic or melodramatic works; choral music and musical compositions, with or without words, designs, drawings, paintings, sculpture, engravings, photographic works, astronomical and geographical globes; plans, sketches and plastic works relating to geography or geology, topography or architecture, or any other science;

and finally every production in the literary and artistic field, which may be published by any method of impression or reproduction."

The learned counsel for the appellant state, in substance, that although the moving picture art has been developed highly in recent years, to the supposed detriment of book-authors, nevertheless, Congress has not seen fit to legislate for the relief of the latter (Brief of Appellant, bottom p. 20 and top p. 21). This inaction of Congress, it is argued, is the consideration which moved the courts to hold that it was not the intention of the lawmakers, that authors should have such protection (Appellant's Brief, top p. 23). We have already sufficiently indicated the sentiment of the various countries as indicated by the conferences and convention referred to. When Congress, in 1909 (March 3, 1909), passed the Act "To amend and Consolidate the Acts respecting copyrights," which went into effect July 1, 1909, its very first section, describing the "*exclusive right,*" accorded to an author, provides that the owner of the copyright shall have the exclusive right

"(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; *to dramatize it if it be a non-dramatic work;* to convert it into a novel or other non-dramatic work, if it be a drama; to arrange or adopt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver or authorize the delivery of the copyrighted work in public for profit, if

it be a lecture, sermon, address, or similar production."

"(d) *To perform or represent the copyrighted work publicly, if it be a drama*, or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript, or any record whatsoever thereof; *to make* or procure the making of *any transcription or record* thereof, by or from which, in whole or in part, it may *in any manner* or by *any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce in any manner or by any method whatsoever;*

(e) To perform the copyrighted work publicly for profit *if it be a musical composition* and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it *in any system of notation* or any form of record in which the thought of an author may be recorded and *from which it may be read or reproduced.*" * * *

Thus, it will be seen that Congress, protecting the author of a book in his exclusive right to dramatize it, and to perform or represent it, prohibits any representation, performance or reproduction of the work, in whole or in part, in *any manner* or *by any method whatsoever.*

The broad terms of subdivisions (b) and (d) embrace reproductions by cinematographs, vitagraphs, and the different methods by which a drama may be reproduced and represented upon the stage, by means of moving pictures, while subdivision (e) covers reproductions of musical compositions, by phonographs and other mechanical means.

Public Representation Infringes Copyright.

The English Parliament has at present before it a copyright bill entitled "A Bill to Amend and Consolidate the Law relating to Copyright." Part I, Clause 2, as amended in committee, provides as follows:

> "For the purposes of this Act 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever and in any language; to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work; and shall include the sole right—
>
> (a) in the case of a dramatic, to convert it into a novel or other non-dramatic work;
> (b) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise;
> (c) in the case of a literary, *dramatic*, or musical work, to make any record, perforated roll, cinematograph, *film, or other contrivance by means of which the work may be mechanically performed or delivered,*
>
> and to authorize any such acts as aforesaid."

We thus find that from the earliest period the spirit of Legislation has been to enlarge proprietary rights in literary productions. With the advance of civilization statutes have been enacted to broaden the protection given to authors to meet the shifting and growing conditions.

Literary property, which is the product of the brain, is just as sacred, and *at least* as valuable, as property which is the product of the muscle. This has been recognized the world over, and so

we find a broadening of the statute to protect intellectual productions just as we find the growth of statutes to protect personal ownership in other kinds of property. The result of intellectual industry, in the form of a literary product has all the attributes essential to the constitution of property produced by bodily labor, and is just as sacred from spoliation or theft, either directly or by attempted circumvention.

In the United States the author of a novel, prior to 1891, could reserve the right to dramatize and translate his own works. After 1891 that right existed without any express reservation, although it is said by one of the best authorities on literary property (Drone) that even prior to 1891, the right of dramatization existed in the author without giving express notice of reservation (Drone on Copyrights, 445-446).

This question is not material in the case at bar, because "all rights" were expressly "reserved" by Harper & Brothers in publishing "Ben Hur," and due notice thereof given (Record page 4), in the several copies of every edition published.

The exclusive right thus existed in the owner of the copyright of the book to make a dramatization, and no one could dramatize "Ben Hur" without violating the rights of the owner of the copyright, even had "Ben Hur," never been dramatized by the complainants.

What the Kalem Company did was to dramatize "Ben Hur," and give a performance of that dramatization before a high speed camera, and then reproduce that dramatization upon the stage.

A dramatization is prepared by taking the novel extracting therefrom such of the principal scenes

and incidents as are deemed capable of stage representation, writing a description thereof in dialogue or otherwise, so as to aid the performers in depicting the scenes and incidents and telling the story, as thus extracted, and have them perform it in a way that will convey to the audience sufficient of the story of the book to be readily identified.

Now, what defendant admits in the statement of facts it did, was just that.

> "The Kalem Company procured one Gene Gauntier to read the complainants' book 'Ben Hur' * * * * and to write out a description or abstract of certain portions of the said book which are described in Exhibit 'E' attached to the bill of complaint in such form and substance *that said description could be closely followed in action.* Thereafter it procured certain persons and animals and their accoutrements, etc., and caused to be performed the actions and motions prescribed by said Gauntier, and during the performance defendant caused a negative moving picture film to be taken by its own apparatus in the manner above described. * * * *That said pictures correctly represent sufficient of the story of 'Ben Hur' to be readily identified.* When the said pictures were taken *the Kalem Company expected that the said films or some or all of them would be put to various uses to which moving pictures can be put as above described, including exhibition in theatoriums and theatres"* (Record, p. 20).

Is that anything but a dramatization of a novel and a production thereof, by a company of actors, before the camera, followed by a stage representation? Indeed, the dramatization and perfor-

mance thereof, *were only made for the purpose of having them put to the use described in the record, viz.: to have the performance reproduced in theatres and theatoriums.*

Confessedly the defendant could not have taken the book and made a short dramatization of the story and have it performed in a theatre by the defendant's dramatic company, but it has done the same thing by having its dramatic company perform before a high speed camera, and then have the performance reproduced, not in one theatre only, but, by means of duplicating the film, in several hundred theatres.

It is a shallow fallacy to contend that defendant has simply taken *photographs or pictures* of various characters and scenes of the book. A photograph by means of a camera is developed, to be used, sold, distributed or exhibited as a photograph or picture. *This defendant never developed the film for use as a photograph of any character or scene. No one ever had a picture of a scene or any part of the story acted by the defendant's dramatic company.*

A photograph of a scene upon the stage, or of the characters, *does not tell the story of the play.*

The negative film was taken, from which positive films were made for the purpose of giving exhibitions in theatres, of the performance given by the defendant's company of actors, and the public was invited to witness a stage production of "Ben Hur." No picture or photograph has ever been sold as such, *no one was invited to see a picture,* but the audience paid to attend a performance of "Ben Hur" and it was so advertised (Record, p. 7).

Public Representation Infringes Copyright.

The infringement of complainants' rights is the same, and the injury as great, whether the pantomimic performance be by the original company of actors, or by a perfect reproduction of such performance in the manner described in the record. It is a pantomimic performance of "Ben Hur," telling precisely the story that was originated by General Wallace, and which is his sole property and that of his assignees and licensees.

Counsel for appellant argue that "complete "appropriation of the book may be secured with- "out relief, by reading the words of the book "upon the phonograph record and preparing a "graphic accompaniment by a series of moving "pictures of everything described, and simul- "taneously delivering the contents of one through "a talking machine and of the other through a "picture projecting machine," and it is said that for this "the law gives no remedy" (Brief, p. 21).

In other words, a company of actors may give a perfect performance of a drama before a high speed camera, and each member of the company read his lines upon a phonographic record, and then a complete performance may be given upon the stage by reproducing the camera performance, with the delivery of the lines of the different parts reproduced by the phonograph record.

This reproduction of the play, with characters, scenes, costumes, dialogue and plot of a story, counsel argue. may be "a complete appropriation of the book," but the author is "without relief." because "the law gives no remedy."

The appellant appreciates that in order to logically maintain its position, this contention must be made. We admit that if the argument be tenable a new method of pirating a book has been

discovered by which a dramatic work may be reproduced upon the stage without the change of a word or the substitution of a character, *provided only* that the piratical performance *first* took place before a high speed camera and with the aid of a phonograph.

The argument is based on the contention that although the dramatization of the book was without authority, and the performance by the dramatic company unauthorized, still as the *reproduction* of the performance is not by characters in real life, it is *not* a "stage representation or performance" within the meaning of the statute.

As we have stated, the Act of Congress, first giving to authors not only the exclusive right to print, but of stage performance, was passed in 1856.

The first important case following that statute on the question of what is a stage production, was *Daly* vs. *Palmer*, 6 Blatchf., 256, decided in 1868 by the late Judge (thereafter Justice) Blatchford, than whom there was no more learned exponent of the law of dramatic property. That case became the leading authority on the question, and has been followed in innumerable cases since 1868. It is looked upon as a judicial landmark and guide in the law of the theatre, and when the play which Judge Blatchford had before him in 1868 ("Under the Gas Light"), and the same act therein referred to by him (the railroad act) came before the Circuit Court of Appeals in 1892 in the case of *Daly* vs. *Webster* (56 Fed. Rep., 483), that court approved and followed the decision of Judge Blatchford.

In the *Daly* vs. *Palmer* case it appeared that Augustin Daly wrote a play entitled "Un-

der the Gas Light." It contained what was called a "Railroad scene," in which a character is tied hand and foot and laid across the tracks and fastened to the rails. As the whistle of a train is heard, another character, the heroine, who is locked in a shed, takes an ax, breaks open the door and rescues the character in danger as the train passes the stage. The defendants in that case gave a performance of a play called "After Dark," which contained an act telling the story as told by Daly in the "Railroad scene," without using his words or dialogue.

It was an undisputed fact that the representation on the stage of a train of cars drawn by a locomotive was not new, nor was the incident of a character in a play or story, in danger of his life from a passing train, original with Mr. Daly, but the *combination* and sequence of events had never been told in that way prior to "Under the Gas Light." Substantially the same argument was addressed to the court as is made by the defendant, namely, that the incidents told in the "Railroad act" were not in themselves a dramatic composition, or a public representation of a dramatic composition within the meaning of the copyright law, *where no portion of the dialogue was used, and the action was practically a "dummy show."*

Judge Blatchford said:

> "The first inquiry is, what is meant in the act of 1856 by a 'dramatic composition,' what is meant by the 'public representation' of a dramatic composition, and what is meant by the right to 'act, perform or represent' a dramatic composition, on 'a stage or public place'? The act of 1856 confers on the author or proprietor of a copyrighted 'dramatic

composition, designed or suited for public representation,' the sole right of acting, performing or representing the same on a stage or public place, in addition to the sole right to print and publish such composition. The latter right must be considered as being conferred by the act of 1831, for although that act only speaks of a copyright for a 'book or books, map, chart, musical composition, print, cut or engraving,' yet under the language of the act of 1856 a 'dramatic composition,' designed or suited for 'public representation,' must be regarded as embraced within the act of 1831. A composition, in the sense in which that word is used in the act of 1856, is a written or literary work invented and set in order. A dramatic composition is such a work in which the narrative is not related, but is represented by dialogue and action. When a dramatic composition is represented in dialogue and action by persons who represent it as real, by performing or going through with the various parts or characters assigned to them severally, the composition is acted, performed or represented; and if the representation is in public, it is a public representation. *To act, in the sense of the statute, is to represent as real, by countenance, voice or gesture, that which is not real. A character in a play who goes through with a series of events on the stage without speaking—if such be his part in the play—is none the less an actor in it than one who in addition to motions and gestures, uses his voice. A pantomime is a species of theatrical entertainment in which the whole action is represented by gesticulation without the use of words.*

A *written work* consisting wholly of directions set in order for conveying the ideas of the author on a stage or public place by means of characters *who represent the narrative wholly by action, is as much a dramatic*

composition designed or suited for public representation as if language or dialogue were used in it to convey some of the ideas. The 'railroad scene' in the plaintiff's play is undoubtedly a dramatic composition. *Those parts of it represented by motion or gesture, without language, are quite as much a dramatic composition as those parts of it which are represented by voice.* This is true also of the 'railroad scene' in 'After Dark.' Indeed, on an analysis of the two scenes in the two plays, it is manifest that *the most interesting and attractive dramatic effect in each is produced by what is done by movement and gesture entirely irrespective of anything that is spoken.* The important dramatic effect in both plays is produced by the movements and gestures which are prescribed and set in order so as to be read, and which are contained within parenthesis. *The spoken words in each are of but trifling consequence to the progress of the series of events represented and communicated to the intelligence of the spectator by those parts of the scene which are directed to be represented by movement and gesture.* * * *

Movement, gesture and facial expression, which address the eye only, are as much a part of the dramatic composition as is the spoken language which addresses the ear only; and that part of the written composition which gives direction for the movement and gesture is as much a part of the composition and protected by the copyright, as is the language prescribed to be uttered by the characters. And this is entirely irrespective of the set of the stage, or of the machinery or mechanical appliances, or of what is called in the language of the stage, scenery, or the work of the scene painter. * * *

The adaptation of such series of events to different characters who use different language from the characters and

> language in the first play, is like the adaptation of the musical air to a different instrument, or the addition to it of variations or of an accompaniment. The original subject of invention—that which required genius to construct it and set it in order—remains the same in the adaptation. A mere mechanic in dramatic composition can make such adaption, and *it is piracy if the appropriated series of events when represented on the stage, although performed by new and different characters using different language, is* RECOGNIZED BY THE SPECTATOR THROUGH ANY OF THE SENSES TO WHICH THE REPRESENTATION IS ADDRESSED, *as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order.* * * *
>
> "*The true test of whether there is a piracy or not is to ascertain whether there is a servile or evasive imitation of the plaintiff's work,* or whether there is a *bona fide* original compilation made up from common materials and common sources, with resemblances which are merely accidental, or result from the nature of the subject."

When this same question was before the Circuit Court of Appeals in 1892, in *Daly* vs. *Webster,* 56 Fed. Rep., 483, the Court said, at page 486:

> "Upon the main point of the case, namely, whether the combination or series of dramatic events (apart from the dialogue) which makes up the particular scene or portion of the play claimed to be infringed, is a dramatic composition, and as such entitled to protection under the copyright laws, it is necessary to add but little to the exhaustive opinion of Judge Blatchford, reported in *Daly* vs. *Palmer,* 6 Blatch., 256. The same scene in the same

> play is elaborately discussed by him, and in his conclusion that it is a dramatic composition, we concur. *In plays of this class the series of events is the only composition of any importance. The dialogue is unimportant, and as a work of art, trivial.* The effort of the composer is directed to arranging for the stage a series of events so realistically presented, and so worked out by the display of feeling or earnestness on the part of the actors, as to produce a corresponding emotion in the audience. Such a composition, though its success is largely dependent upon what is seen, irrespective of the dialogue, is dramatic. *It tells a story which is quite as intelligible to the spectator as if it had been presented to him in a written narrative.* The mere exhibition of mechanical appliances to represent incidents is not to be included within this classification. There must be a series of events, dramatically represented, in a certain sequence or order. In other words, there must be a 'composition,' *i. e.*, a work invented and set in order—a work of various parts and characters, which, when put upon the stage, is developed by a series of circumstances.

Appellant, criticizing the cases of *Daly* vs. *Palmer*, *Daly* vs. *Webster*, *Webster* vs. *Daly* and *Brady* vs. *Daly*, contends:

(a) That in the Daly cases the complainant relied upon a dramatic copyright, the chief feature of which was appropriated by the defendant in a drama, whereas, in the present case, there is no correspondence between the complainants' drama and defendant's film (Ap. Brief, p. 28).

The defendant's production is a stage representation of the dramatization of the book, and violates not only the exclusive *right of dramatiza-*

tion possessed by the owners of the copyright of the book, but as well the successful dramatization made by the complainants.

The allegations in the bill *stand admitted or proved* to the effect, that the defendant's production represent the characters, scenes and incidents of the book and dramatization of "Ben Hur," presenting the different characters in action, so as to tell the story of "Ben Hur" *as produced by your orators upon the stage.* That "the representation is given upon the stage and the moving pictures show all the characters and scenes in action, as produced by your orators and tell the story as told in the book of Gen. Lew. Wallace, and in the dramatization thereof," referred to in the bill; that "the productions as given by the defendant and its licensee, are not only given under the said title of 'Ben Hur,' but are published, advertised, announced and *declared to be the play 'Ben Hur,' dramatized and adapted from the book of the said Gen. Lewis Wallace, and the production and representation, as given, teli the story told in the book of the said Gen. Lewis Wallace, and the said dramatization of the said book*" (Record, pp. 6-7).

Counsel state that the proofs do not explain the contents of the drama, but it is not denied that the dramatization by the complainants tells the same story as told in the book, and the defendant's performance tells a similar story (Record, pp. 6, 7, 20).

(b) It is then argued that Judge Blatchford invoked a general rule that the appropriation of an *idea* underlying the copyrighted drama in another drama, would constitute in the latter an infringement, and that that learned jurist's decision,

though specifically advanced before this court in White-Smith Co. *vs.* Apollo Co. (209 U. S., p. 4) was distinctly rejected (Brief, p. 29).

Judge Blatchford did *not* hold that *a mere idea* in the abstract may be the subject of exclusive appropriation. What Judge Blatchford held was that when Augustin Daly originated the "Railroad act," which told an *essential* part of the plot for his play, it could not be appropriated by another dramatist, who undertook to tell the same story in another play. Nor did this court in White-Smith Co. *vs.* Apollo Co. reject Judge Blatchford's decision. In that case this court held, that a perforated roll of music used in connection with and as part of a mechanical arrangement for the reproduction of music, is not a *copy* of the staff notation of a copyrighted musical composition.

Counsel in that case did *not* present the question, whether a *performance* of a copyrighted composition with the aid of a perforated music roll affixed to an instrument as part of a mechanical arrangement was "a public performance," and the Court said:

> *"There is no complaint in this case of the public performance of copyrighted music; nor is the question involved whether the manufacturers of such perforated music rolls when sold for use in public performances might be held as contributing infringers."*

The learned counsel for the appellant concede in their brief at page 34, that counsel in the Perforated Music Roll case probably *designedly refrained from presenting the question of a public performance* for the reason that had the complainant prevailed upon it, it would have been

of little avail, since most of these instruments are used in private houses and the commercial value of restraining public performance of them would have been relatively trifling.

In this case, however, the *value* to complainants *consists in the public representation of the book as dramatized.*

(c) It is then stated by counsel that Judge Blatchford's specific rule—that a dramatic composition may be infringed by the adoption of the scene or dramatic incident, even though the accompanying written dialogue be discarded or replaced—has been judicially investigated and discarded in recent English cases (Appellant's brief p. 29).

The two English cases cited are Scholz *v.* Amasis (Eng. Law Times, issue of May 19, 1909) and Tate *v.* Fullbrook (38 L. T. Rep., 397; 3 App. Cas., 483).

We can not find the case of Scholz *v.* Amasis reported and the case of Tate *v.* Fullbrook is cited as being reported in 38 L. T. Rep., 397. In that book we do not find Tate *v.* Fulbrook but the case of Chatterton *vs.* Cave, in which Lord Coleridge, L. C. J., found the *fact* to be that the defendant in that case *did not take a substantial or material part* of any one portion of the plaintiff's drama, and, of course, *upon that finding of fact*, the legal conclusion of Lord Coleridge in favor of the defendant was affirmed.

Tate v. *Fullbrook* is reported in 14 Amer. & Eng. Annotated Cases, 428; also 1 K. B. 821. The question there passed upon is best stated in the concise language of Vaughan Williams, L. J. (at p. 431):

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> "All that we have here is a certain similarity of stage situations and scenic effects, which ought not, in my opinion to be taken into consideration at all in a case where there is no appreciable similarity between the words of the two productions"

The defendant in that case was charged with imitating "plaintiff's make-up and style of acting" or stage "business." The Court held that such matters taken by themselves are not a subject of protection under the English Copyright Acts.

The attention of the Court is directed by counsel to the case of Hanfstaengel *v.* Baines (Law Rpts. Appeal Cases 1895, p. 20).

The plaintiff in that case was the owner of the copyright in certain pictures, and at the Empire Palace, Limited, in London, there were representations given of groups of living persons, and sketches of these Living Pictures were published by the defendants in the "Daily Graphic," a newspaper of which they were proprietors, with explanatory letterpress. The plaintiff claimed that this publication was in effect a copy of his pictures. The court found, as a fact, that they are not copies of the paintings.

The language of Lord Herschell, L. C., at p. 24 is significant:

> "I am far from saying that what is called a Living Picture may not be so arranged to represent an existing painting that a photograph or drawing of a Living Picture would be a copy of the design of that painting. All I say is that this must depend upon the character of the picture and what is justly to be regarded as its design."

And Lord Shand (at p. 30) uses this language:

> "It seems to me to be clear that a painting, drawing or engraving may be a copy or reproduction of the work of another though it has not been made directly from that work itself, but by the use of intermediate copies or other indirect means such as the Living Pictures which were exhibited in the present instance, and which were intended to be a close representation of the paintings, the copyright in which is assumed to belong to the appellant. Whether the particular painting or drawing complained of is a copy, or reproduction of another picture 'or the design thereof,' is a question of fact, and it is not easy, if indeed possible, to formulate the considerations which must be taken into view in all cases in answering the question."

(d) It is then contended that the courts in the Daly cases, in order to establish infringement, extended the statute beyond any constitutional warrant (Appellant's brief, p. 32).

We must not follow too religiously counsels construction of Judge Blatchford's decision. We prefer to have the Court consider his opinion as he wrote it, which cannot be aided by argument. That learned jurist never decided that a fugitive idea could be the subject of exclusive appropriation. Mr. Daly told a story in a play with the aid of characters, scenes and some unimportant dialogue. It was a forceful and dramatic story; it created great interest and made his play highly successful. The defendants in the Daly cases, recognizing the value of that *essential* part of Daly's dramatic story as told in the "Railroad act," appropriated it by changing the language of Daly, but *telling the same story* by means of characters, scenes and stage accessories.

This, Judge Blatchford held, was literary piracy, and could not be done. The defendants had appropriated a material part of Mr. Daly's story as told by him with the aid of scenes, characters, costumes and stage paraphernalia.

In the case at bar the defendant did more. It appropriated not a scene nor an act, but *the entire story of the book, which the complainants had dramatized for stage production*, and in which they invested a fortune. The defendant reproduced upon the stage the same story, dramatized by it from the book, which it or its licensees advertised under the title "Ben Hur," tending thereby to injure complainants' production by reason of the cheap performances given by defendant in theatres, to which audiences flock because of the low price of admission, viz.: five and ten cents.

Dialogue is not essential to a stage performance. Many beautiful, spectacular stage productions are given without dialogue. The attractiveness of "Ben Hur" does not depend upon the dialogue as the stage pictures tell the story. The best evidence of this is that complainants expended in the *staging of the play* upwards of One hundred thousand Dollars (Record, p. 6, top).

As stated by Judge Blatchford in *Daly* vs. *Palmer* "Pantomime is a species of theatrical entertainment in which the whole action is represented by gesticulations without the use of words." Drone, in his work on Copyright, page 588, says:

> "In many dramas, important scenes are represented on the stage by action without words, and hence can only be described in written language. A pantomime or a ballet may be a drama. The acting of either is a *dramatic representation;* the written descrip-

> tion or directions for the actors is a dramatic composition in which the action or story is narrated. *Indeed, many scenes or occurrences constituting in themselves, dramas or material parts of dramas can be represented on the stage by action alone;* in language they can only be described. *Yet, they are dramatic productions*" (see also pages 593 and 594).

In Brackett's Theatrical Law, published 1907, the author says, at page 60:

> "This element of human interest, which to a greater or less extent must enter into all dramatic compositions, depends entirely upon some physical personal connection with the piece enacted, which shows some mentally evidenced thought appealing directly to the heart or intellectuality of the spectator. The person who speaks or controls need not be visible, as in the performance of marionettes, nor need he utter words when in view, as a clown in a pantomime, for the voice explaining the action and gestures of the marionette, and *the mind working through the pantomime art of the clown, both illustrate some feature of life with its story of human interest.* * * *"

And at page 61:

> "A character in a play who goes through with a series of events on the stage without speaking, if such be his part in the play, is none the less an actor than one who, in addition to motions and gestures, uses his voice. A pantomime is a species of theatrical entertainment in which the whole action is represented by gesticulation without the use of words."

Some of the most profitable stage productions have been pantomimes, such as "Humpty Dumpty," "Bluebeard," etc. It is the custom in Lon-

don, about Christmas time, to give an elaborate stage production of some new pantomime. Surely no one could tell the pantomimic story before a camera and reproduce it upon the stage by means of moving pictures. This would be the purest kind of circumvention, which no court of justice could sanction.

Lee vs. Simpson, 3 Common Bench Reports, page 871, was an action brought under the English Copyright Act (3 and 4 W., 4 C. 15) to recover penalties for presenting a pantomime called "Princess Battle" or "Harlequin Shuttlecock." The defendant acted in good faith, having bought the pantomime from one Lee de Hays in the *bona fide* belief that he was its author. The Court said (at page 881):

> "The next point insisted on was, that the production in question—a pantomime—is not within the protection of the act. The statute professes to protect 'any tragedy, comedy, play, opera, farce or any other dramatic piece or entertainment, composed, and not printed and published by the author or his assignee.' It is said that pantomimes are not expressly mentioned in the act, and that this is not an entire work. * * * It was intended merely as an introduction to what is called in theatrical parlance, 'the comic business,' the tricks of the pantomime. That it was valuable property is shown by the defendant's buying it. As far as we can collect the meaning of the statute, it seems to us to be a dramatic piece, of the description the act was meant to protect."

The idea of circumlocution adopted by defendant is not wholly original with it. It was attempted in the case of *Turner vs. Robinson*, 10 Irish Chancery Reports, 121 (on appeal 510).

There the well known painting of "The Death of Chatterton" was reproduced in this way: The infringer painted a rough background, in semblance of the painting and had living models pose, as in the picture, before a camera, and then advertised it as "the most effective and beautiful stereopticon views ever produced of the last moments and death of the Poet Chatterton."

The Court held that to be an infringement of the painting, saying:

> "He (defendant) announces for sale 'the most wonderfully effective and beautiful stereoptican views ever yet produced, photographed by him from the living model representing the last moments and death of Chatterton,' and he adds that he begs most emphatically to deny that he copied or printed the stereoptic slides from any picture exhibited in Dublin, and that it was obvious that the picture he produced (that is, the slides) could not be obtained from the flat surface of a painting. The same statement is repeated by his advertisement of the 2d of May. The facts stated in both are literally true; the stereoptic slides are not photographs taken directly from the picture in the ordinary mode of copying, but they are photographic pictures of a model itself copied from and accurately imitating in its design, and outline the petitioner's painting. It is through this medium that the photograph has been made a *perfect representation.* Thus the object contrived and achieved and the consequent injuries are the very same as if the copy had, in breach of confidence, been made on the view and by the eye, and *no court of justice can admit that an act, illegal in itself, can be justified by a novel or circuitous mode of effecting it. If it is illegal, so must the contrivance be by means of which it was effected*" (page 521).

So here, a pantomimic performance of the play telling the same story as complainants' book and play, could not be publicly represented, and "no court of justice can admit that an act, illegal in itself, can be justified by a novel or circuitous mode of effecting it."

Counsel for defendant urge that the pictures are not a representation of the *actual performance given by complainants.* We claim that the exhibition is a public representation of "Ben Hur," and cannot be given whether it be a deliberate "copy of complainants' performance" or merely defendant's dramatization of the novel, followed by a performance by its company of actors, although not directly copied from complainants' play.

The right of public performance of such dramatization is vested exclusively in the author, and by no circumvention can a dramatization be made, or a public representation given of the story of "Ben Hur," without the consent of its author or his assignees.

The argument of the learned counsel for appellant is very much like that advanced by defendant in *Turner vs. Robinson, supra.* The defendant in that case did not actually copy the painting, "The Death of Chatterton," but by indirection he reproduced it by painting a background similar to the original, and then having live characters, answering to those in the painting, pose before the camera. Then he undertook to give an exhibition of it, just as this defendant does, by throwing the picture upon a screen by means of a stereopticon. This was held to be a public exhibition of it. The defendant in that case, as in this, thought that he had devised a new method of circumventing the Copyright Law, first, by having characters pose before a camera,

and then by means of a film and projecting machine or stereopticon, throwing the result upon a canvas or screen. He found, however, that justice was not so blind as not to see his stratagem.

The Federal Courts have always jealously guarded the rights of authors against encroachment by pirates no matter what form the infringement assumed.

> "Infringement is the use of literary property in violation of the legal rights of the owner and is applied to the *unlawful taking* of any kind of intellectual property whether it be literary, dramatic or artistic."
>
> 9 Cyc., 938.

"The intention of the copyright laws, as declared by the Constitution, being to promote the progress of science and useful arts, they should be liberally construed to carry out such intention." (*Syllabus.*)

> Werckmeister *v.* American Lithographic Co., 142 Fed. Rep., 827; cited with approval in American Tobacco Co. *vs.* Werckmeister, 146 Fed. Rep., 375-6.

Different methods of appropriating literary property have been resorted to as we advanced in the arts and sciences, but with the changes adopted by the pirates, the courts kept pace with remedies.

Morgan in his work on Literature (Vol. II), says, in paragraph 294, page 287:

> "The dramatic author, therefore, enjoys the privilege extended to the author of no other class of composition, of copyrighting

> his manuscript, and thenceforward, to prevent its piracy by multiplication, *not of copies, but of representations of its contents,* a privilege we have seen in addition to and not in diminution of any of the other privileges to which, as an author, he is entitled."

and again, at paragraph 313, page 334:

> "If an author has any right at all in his composition, or if courts have any power to protect him in those rights, *it is difficult,* we repeat, *to see how the mere process employed in the piracy is to take away that right, or to cancel that power."*

This defendant has simply adopted an advanced method of "representing the contents" of complainants' book and play. It has kept pace with the advanced state of the art by which a stage performance can be given for the edification of an audience at the low rate of five or ten cents. It would not pay to have a company of actors give afternoon and evening performances in a theatre for five or ten cents as the price of admission. Therefore, to cut expenses and permit of performances at this low price, the present state of the art permits of a performance before the camera and a reproduction upon the stage in the method described. It is in the last analysis a performance of the play which can be given in a way that will reproduce the same scenes, characters, costumes, staging, scenery and *personae dramatis,* and tell the story as originated by the author, and with the use of "illustrated titles" (See Record, p. 19, Exhibit E), aid the audience in following the plot.

Great stress seems to be laid upon the fact that in connection with the exhibitions which are given

of "Ben Hur", the defendant's films must be operated in connection with what is termed "exhibiting machines." This argument does not aid a solution of the question under discussion. A stage is also used, but as counsel frankly state in their brief, the presence or absence of stage, scenery or curtain is not important for "if the performance were dramatic in any legal sense, it would be questionable whether the absence of the stage, curtain and scenery is material." (Appellant's brief, p. 24.)

The essential to be kept in mind is that the defendant's objective point was to give a stage representation of "Ben Hur," and for that purpose employed a dramatist, who dramatized the book, and a company of actors to play the dramatization before its high speed camera, *in order to carry out its end, viz., the reproduction of "Ben Hur" in theatres at cheap prices.*

Counsel quoting the language of the court below said: "The artist's idea of describing by action the story the author has written, is a dramatization." "But," continued counsel, "the true test is not that, but whether the public exhibition of the pictures constitutes a drama." (Appellant's brief, p. 24.)

If, as is practically conceded, the defendant in employing Gauntier to take the book of General Wallace and write the story for performance by its company of actors, thereby caused a dramatization to be made, then that, of itself, was an infringement of and a violation of the complainants' *exclusive* right to dramatize the copyrighted work, and surely a *public exhibition of that dramatization* is violative of the rights of the owners of the copyright of the book, as well as of their dramatization.

Public Representation Infringes Copyright.

As we have stated, it is not an exhibition by defendant of pictures as we see them in a museum. *The film is never developed for purposes of sale or distribution of any photograph or picture.* On the contrary, the film is kept undeveloped for use in theatres to reproduce, for the benefit of the audience, the performance given by defendant's dramatic company, in costume and with scenery, of the defendant's unauthorized dramatization, telling in dramatic form, the story of the copyrighted book of "Ben Hur."

It was conceded by defendant's counsel in the Circuit Court of Appeals that "*a rendering* of a drama *by mute actors would constitute a performance or representation*" (p. 20, Appellant's Brief below). This concession is omitted by defendant in its brief filed in this court, evidently for the reason that counsel is now convinced that the defendant cannot have mute actors give a performance before the camera.

But defendant says, that the *reproduction* is not with the aid of its dramatic company.

Defendant's unique contention necessitates the argument that to violate an author's right of public performance of his book or play, there must be human actors present. Not at all. The means by which the story is conveyed to the audience is not material. If we cling to the test laid down by Judge Blatchford in *Daly* vs. *Palmer, supra,* we cannot go wrong, *i. e.,* does the infringing representation tell the same story as that originated by the author? It makes no difference whether it be conveyed to the audience by mute actors, marionettes, puppets, or a production before a high speed camera, reproduced upon canvas.

2 Morgan on Literature, p. 680, Section 459.

Drone on Copyright, pp. 590-596 and 627-629 and 634.

Brackett on Theatrical Law, Sections 50-55 and 99-100.

Wandell on the Law of the Theatre, pp. 448 and 503.

MacGillivray on the Law of Copyright, pp. 276, 277.

American Mutoscope Co. *vs.* Edison Manufacturing Co., 137 Fed., 262.

Bracken *vs.* Rosenthal, 151 Fed., 136.

Lee *vs.* Simpson, 3 C. B., 871-881.

IV.

It is somewhat late in the day to contend that the statute is unconstitutional because a stage representation of a dramatic composition is not a copy of the "writing" of the author.

The first Copyright Law of 1790, *included maps and charts,* and many of the members of Congress that passed that Act were members of the convention which framed the Constitution (*Lithograph Co.* vs. *Sarony,* 111 U. S., 53). For over half a century the exclusive right of dramatization and performance granted to authors of books and of dramatic compositions has been recognized as a valid statutory enactment. Under the liberal

construction placed upon the word "writings" in the Constitution protection has been afforded to the creators of photographs, maps, charts, designs, engravings, etchings and other prints.

> "* * * No one would now claim that the word 'writing' in this clause of the Constitution, though the only word used as to subjects in regard to which authors are to be secured, is limited to the actual script of the author, and excludes books and all other printed matter. By 'writings' in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas of the mind of the author are given visible expression." (*Lithograph Co.* vs. *Sarony*, 111 U. S., 53.)

Indeed, in the case of dramatic compositions, as in musical compositions, the chief value to the author or composer is in the public representation and performance. There is no profit in selling "copies" of the play or opera. The value is in a public representation and it is created with a view to such public performance.

Appellant's position is stated by it in these words:

> "Our contention, in its essence, is, that if the author has chosen to express his ideas in words, his protection must, under the Constitution, *be limited to that form of expression*, and cannot be extended to cover an expression of the same ideas by pictures or maps or diagrams; any one of which constitutes an essential different writing, not a copy, of the author's writing, even though it may be an exact and full expression of the same ideas" (Brief, p. 42).

This construction of the Constitution would limit the rights of an author to the multiplying of "copies" of his work. It would render unconstitutional every paragraph of the Copyright Act, which grants to an author the exclusive right to "translate the copyright work into other languages or dialects"; to "make any other version thereof, if it be a literary work"; to "dramatize it if it be a non-dramatic work"; to "convert it into a novel or other non-dramatic work, if it be a drama"; to "arrange or adapt it, if it be a musical work"; to "deliver or authorize the delivery of the copyrighted work in public for profit, if it be a lecture, sermon, address or similar production"; to "perform or represent the copyrighted work publicly if it be a drama"; to "make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in *any manner* or by *any method* be exhibited, performed, represented, produced or reproduced"; to "exhibit, perform, represent, produce or reproduce it *in any manner or by any method whatsoever*"; to "perform the copyrighted work publicly for profit if it be a musical composition"; to "make any arrangement or setting of it or of the melody of it *in any system of notation* or *any form of record* in which the thought of an author may be recorded and from which it may be read or reproduced."

None of these rights, vested in the author, comes within the definition of "copy of the copyrighted work", and not one "is limited to that form of expression" chosen by the author in copyrighting the book.

Of course an author cannot copyright or protect an idea in the abstract. When, however, an orig-

inal work has been conceived which is expressed in the form of a story published as "Ben Hur," in book form, it is a "writing" which Congress may protect from piracy, even though the methods adopted by the literary pirate may not be to "copy" the book, but to "dramatize" it or "perform or represent" it.

In thus protecting the author in his literary creation, Congress has not protected a mere idea or thought, but the story as originated by the author, no matter what method the infringer has employed to tell the story told in the "writing" of the author.

> "Unless the copyright statute is broad enough to cover any adaptation which contains the plot or theme of the story, it is wholly ineffective."
>
> Dam *vs.* Kirke La Shelle, 175 Fed. Rep., 902; bottom of p. 907.

The statute must be read in the light of the intention of Congress to protect this intangible right as a reward of the inventive genius that has produced the work.

> American Tobacco Co. *vs.* Werckmeister, 207 U. S., 284-299.

Defendant argues that the progress of science and useful arts will not be promoted by an affirmance of the decree at bar, because it would interfere with the progress of photography. What this judgment has done is *not* to interfere with the *photographer* who takes a picture of a character or of a scene, painted in words by General Wallace, and who develops his film and exhibits or sells the photograph, but this decree has been

hurled against the play pirate, who has adopted the modern method of play stealing, by using the camera, *not for the purpose of taking a picture,* but to multiply the stage performance given before a camera, in order to enable him to repeat the performance in hundreds of theatres throughout the country without the expense of additional companies of actors. The defendant stands before the court not as a photographer, representing a reputable body of photographers, but representing the Twentieth Century plagiarist.

The Supreme Court said in 1884 (in the *Sarony* case), that, "No one would now claim that the word "writing" in this clause of the Constitution is limited to the actual script of the author."

We learn from the brief of counsel for the defendant that some one *now* does claim practically that.

It is respectfully submitted that the appeal should be dismissed, or the judgment of the Circuit Court of Appeals affirmed, with costs.

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